RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES

V.

SUFYIAN BARHOUMI

ALSO KNOWN AS:

ABU OBAIDA
UBAYDAH AL JAZA'IRI
SHAFIQ

NO. 050006

VOLUME ___ OF ___ TOTAL VOLUMES

2ND VOLUME OF REVIEW EXHIBITS (RE): RES 35-47
APRIL 26, 2006 SESSION
(REDACTED VERSION)

United States v. Sufyian Barhoumi, NO. 050006

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification. Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and *United States v. Castleman*, 10 M.J. 750, 751 (AFCMR 1981) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

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ALLIED PAPERS	**Not part of "record of trial"**
I[1]	**Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications)**
II[1]	**Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)**

[1] **Interim volume numbers. Final numbers to be added when trial is completed.**

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UNITED STATES V. SUFYIAN BARHOUMI, NO. 050006—2ND VOLUME OF REVIEW EXHIBITS

UNITED STATES V. SUFYIAN BARHOUMI, NO. 050006—2ND VOLUME OF REVIEW EXHIBITS

UNITED STATES OF AMERICA	)	**PO 2 A**
	)	
v.	)	**Modification to PO 2, (Discovery Order)**
	)	
SUFYIAN BARHOUMI a/k/a Abu Obaida a/k/a Ubaydah Al Jaza'iri a/k/a Shafiq	)	**March 3, 2006**

1. This filing modifies PO 2 (Discovery Order).

2. If either party objects to this modification, they shall file a motion in accordance with POM 4-3 not later than 10 March 2006.

3. Add the following to paragraph 10, PO 2:

a. If a matter required to be disclosed is in electronic form, it shall be provided to the opposing party in the same electronic form, unless the disclosing party is unable to do so as a result of a circumstance beyond that party's control, such as a proprietary program being unavailable to the parties, security considerations, or other similar limitation. In the event electronic matter is provided in a different form, the reason for doing so shall be specifically set forth in a transmittal document.

b. Electronic "searchability" of documents.

(1) It is generally not possible to create a completely accurate, text-searchable document using Optical Character Recognition (OCR) or other software, and no party is required to vouch that a text search of any electronic document disclosed by that party will be 100% accurate. While providing documents and other evidence in electronic form is the preferred method of disclosure, and while electronic text searching is a useful technology, it is not a substitute for reading or viewing the matter disclosed. A party receiving information in electronic media is responsible for reading all such information.

(2) Matter shall be considered to have been disclosed pursuant to this Discovery Order when the matter provided is viewable either as displayed on a computer monitor, printed, or in other hard copy form, regardless of whether an electronic text search reveals any particular information that is the object of a text search.

(3) At no time may a party convert a text-searchable or OCR document before serving it on the opposing party in order to prevent the opposing party from using text-search software or tools.

4. Change paragraph 12.c. to read:

c. "Synopsis of a witness' testimony" is that which the sponsoring counsel has a good faith basis to believe the witness will say, if called to testify.

(1) A synopsis shall be prepared as though the subject witness is speaking (in the first person), and shall be sufficiently detailed as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter being offered into evidence. *See* Enclosure 1, POM 10-2 for suggestions.

(2) If any matter that has been disclosed to an opposing party contains a complete synopsis of a witness' testimony, the document is identified by Bates stamp number or otherwise, and the location of the document is reasonably described, no additional synopsis is required to be disclosed, provided that the witness list refers to the matter as containing the synopsis. If a document contains a synopsis of only a portion of a witness' testimony, that document shall be identified as described above, but a synopsis must be provided to the opposing party setting forth any additional matter about which the witness is expected to testify.

IT IS SO ORDERED:

/s/
DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Wednesday, March 15, 2006 3:30 PM
To: Lee Foreman
Cc: [redacted]
Subject: US v. Barhoumi - Continuance and Mr. Foreman
Attachments: Barhoumi continuance email.pdf

I am glad to meet you, Mr. Foreman, and look forward to seeing you at Guantanamo.

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1. The Presiding Officer and I thank you for your reply.

2. The Presiding Officer grants CPT Faulkner's earlier request for a continuance until the trial term of the week of 24 April for the initial session. (That request and an interim reply by the Assistant is an attachment to this email.) We will make every effort to accommodate your request of the timing of the session so that you may first have some time to meet with Mr. Barhoumi.

3. Out of necessity we have established an electronic filing system of sorts. To provide a back-up contact for counsel in the event someone is out of town accounts for the number of email addresses. In addition to counsel detailed to the case, the Chief Prosecutor and the Chief Defense Counsel, both parties have added their paralegals. I offer you the same courtesy that if you wish, I will add a member or members of your office to the email list.

4. Our Rules of Court, called Presiding Officer Memoranda, as well as other legal references valuable to Commissions practice, can be found at: http://www.defenselink.mil/news/commissions.html. Many civilian counsel asked about attire. That is addressed in POM # 16.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Lee Foreman [redacted]
Sent: Wednesday, March 15, 2006 1:55 PM
To: Hodges, Keith
Cc: Faulkner, Wade N CPT USA OSJA
Subject: US v. Barhoumi

Mr. Hodges: Allow me to introduce myself to you. CPT Faulkner has forwarded to me your recent emails, and it

seemed to me to be more efficient for me to respond to you and to answer your questions directly. I have virtually no knowledge as to the identities of the other folks to whom you have sent your recent emails, so have not included them. I have no objection, however, to you sending this on to whomever you might think appropriate. Addressing your questions, and starting with your numbered paragraph 3., here are my responses:

a. I do intend to represent Mr. Barhoumi as soon as the Chief Defense Counsel adds me to the "pool" of qualified civilian counsel. CPT Faulkner is reasonably confidant that such approval will be in place well before the week of April 24, 2006.

b. The week of April 3 is in fact in conflict with other previously set federal court appearances. On the afternoon of April 3, I will appear in the US District Court in Eugene, OR. Though the hearing is unlikely to last the entire week, it is a matter involving multiple defendants and lawyers from different states, and cannot be rescheduled.

c. I am available to attend a session of the Commission the week of April 24 in Guantanamo, and desire to do so. As soon as the Commission confirms that week for Barhoumi, CPT Faulkner and I will make travel arrangements. I plan to be there the entire week, so could attend a session as scheduled by the Commission, with a slight preference that it not be on the Monday as I have not yet met the client. CPT Faulkner and I understand that it is desired that we be prepared to voir dire the Presiding Officer that week, and will be prepared to do so. We also foresee no difficulty in litigating the D 1 motion during that week, as well as a discovery motion, which we anticipate filing on or before April 5, 2006.

I am reluctant to commit to the filing or the litigation of other motions to be resolved on the same schedule due to my recent involvement and significant need to learn more before I open my mouth.

Let me know if the information furnished in this email is sufficient for your purposes, or whether you additionally need something like the Special Appearance you referenced. I am not particularly reluctant to communicate with the Commission directly, because I do anticipate that the paperwork will be in order shortly. I look forward to working on this matter with you, and there should be no hesitation on your part or on the part of the Presiding Officer or Commission to contact me directly as may be appropriate of helpful. Lee D. Foreman

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, March 14, 2006 5:57 PM
To: [redacted]
Subject: US v. Barhoumi, request for continuance

CPT Faulkner,

1. The Presiding Officer is desirous of granting the continuance until the week of 24 April (the exact date in that week to be determined later.) The problem for the Presiding Officer and Mr. Foreman is this:

a. Mr Foreman may be reluctant to communicate with the Commission for fear of making an appearance especially since he has not yet been officially added to the pool of qualified counsel by the Chief Defense Counsel.

b. The Presiding Officer does not wish to place you (CPT Faulkner) in the position of representing Mr. Foreman's calendar and desires.

2. In order for the Presiding Officer to act and grant this request, the Defense team has two options. Mr. Foreman may communicate by email to me and the other parties in the form of a Special Appearance for the Purposes of Docketing. Or, Mr Foreman may communicate directly with you, and you forward his email to me and the other parties.

3. The content of any such email would be:

a. He intends to represent Mr. Barhoumi as soon as the Chief Defense Counsel adds him to the "pool" of qualified civilian counsel.

b. He cannot attend a session of the Commission the week of 3 April because of another court engagement in Oregon.

c. He can, and desires to, attend a session of the Commission the week of 24 April in Guantanamo, and the Defense team (you, he, or both) will be prepared to do the following. (CPT Faulkner, you would be agreeing to this as well.)

(1) Conduct voir dire of the Presiding Officer and make challenges if the Defense believes challenges are warranted.

(2) Litigate the D 1 motion filed by the Defense.

(3) File not later than 5 April 2006 in accordance with POM 4-3 any motion addressing the Discovery Order (PO 2 as modified by PO 2 A) and to litigate any such motion filed at the 24 April session. Failure to file will constitute waiver on Discovery Order issues .

4. The parties are also welcome to file any other motions they wish litigated at this session, and if they desire to do so, to file same not later than 5 April 2006.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Faulkner, Wade N CPT USA OSJA [redacted]
Sent: Tuesday, March 14, 2006 12:29 PM
To: [redacted]
Cc: [redacted]
Subject: US v. Barhoumi, request for continuance

Sir,

The Defense in US v. Barhoumi respectfully requests a continuance from the 3 April trial term until the 24 April trial term. Mr. Lee Foreman is currently in the process of being added to the pool of qualified civilian counsel. I do not foresee any complications with this process.

However, Mr. Foreman has a previously scheduled federal trial in Oregon the week of 3 April and is not available to travel to GTMO. I will be travelling to GTMO that week and would be available to conduct limited 8-5 sessions. Mr. Foreman is available the week of 24 April.

If something more formal than this email is necessary, please let me know and I will file a formal request for continuance.

v/r

CPT Faulkner

WADE N. FAULKNER
CPT, JA
Senior Defense Counsel
[redacted]

UNITED STATES OF AMERICA	**DEFENSE**
v.	Motion for Appropriate Relief Objection to Presiding Officer's Discovery Order and Request for the Commission to Adopt the Discovery Rules and Procedure under Courts-Martial Practice
SUFYIAN BARHOUMI	**5 April 2006**

1. This motion is timely filed by the Defense in the case of *United States v. Sufyian Barhoumi*, and addresses the need for this Military Commission to adopt the discovery rules and procedures applicable to courts-martial practice.

2. **Relief requested.** The Defense requests this Military Commission adopt the discovery rules and procedures employed in courts-martial practice and the applicable case law relevant thereto and modify the Discovery Order (PO2) (hereinafter "the discovery order") dated 21 December 2005 to conform in such a manner. In the alternative, the Defense requests this Military Commission adopt specific changes to the discovery order and modify said order to incorporate such specific changes.

3. **Synopsis.** This Military Commission's procedures with respect to discovery are incomplete and minimal. Discovery is fundamental to a full and fair trial. The Military Commission should adopt the discovery rules and procedures utilized in courts-martial practice and the applicable case law. As such, the discovery order and discovery obligations should be modified to conform to such practice.

4. **Burdens of Proof and Persuasion.** The burden is upon the Prosecution to justify departure from the established procedures used in courts-martial and federal court practice.

5. **Facts.** This is a legal question regarding the applicable law in the area of discovery that should apply to this Military Commission.

6. **Argument.**

A. Appropriate discovery procedures and obligations are part of Due Process protections and establishing discovery procedure and obligations protects Mr. Barhoumi's right to a fair trial.

This Military Commission is governed by the requirements of Due Process. The government's compliance with discovery obligations is part of the Due Process protections inherent in a fair trial. [*See Brady v. Maryland*, 373 U.S. 83 (1963)] Since discovery procedures and obligations are scantly addressed in the orders and instructions governing this Military Commission, adopting the discovery procedure and obligations as practiced in military courts-marital is necessary to a full and fair trial. The Supreme Court has expressly declared, "Congress,

of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings."[1] The Due Process standard that courts apply when reviewing military tribunals' procedures is deferential: "in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces. U.S. Const., Art. I, § 8."[2] In this instance, however, there is no need or cause for such deference. Neither Congress nor the President has attempted to foreclose the application of established discovery procedures and obligations. Accordingly, the Due Process Clause's "measure of protection [for] defendants in military proceedings,"[3] provides Mr. Barhoumi with the right to discovery and access to evidence in preparation of his defense.

One fundamental—and sure to be recurring—problem in military commission practice is the question of how to fill gaps in procedural and evidentiary rules. Adopting established rules will ensure that further creation of "commission" rules and procedures after the fact will be avoided.

Compared to the 2005 Manual for Courts-Martial (MCM), or the Federal Rules of Criminal Procedure, the orders and instructions establishing commission procedures are sparse. But the procedural gulf between the two established federal criminal justice systems and the military commission system is even wider than the disparity in their formal governing rules would suggest. In both the federal civilian and court-martial systems, extensive case law augments the already-detailed procedural rules. The commission system, however, has no such case law background. Procedural voids are, therefore, inevitable, and will likely be extensive.

Fortunately, a ready source of procedural guidance exists to fill many of those gaps: the MCM. As has every MCM since the 1928 Army Manual, the 2005 MCM provides that "[s]ubject to any applicable rules of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures [sic] and evidence prescribed for courts-martial."[4] Thus, to the extent that court-martial practice in the area of discovery does not conflict with the specific provisions of a military commission order or instruction, it should govern the commission process. Such action will provide all participants with a familiar framework, which has been developed and explained by appellate history, promoting a full and fair trial.

B. The discovery order fails to correct a substantial absence of discovery procedures and obligations.

The discovery order fails to address numerous areas that are typically incorporated into the discovery process. Examples of the failure of the discovery order and the absence of discovery procedures and obligations in this system are:

a. The failure to impose on the prosecution the burden to disclose information as referenced within Rule for Court-Martial (RCM) 701(a)(6) and the ABA Model Rules for Professional Conduct, Rule 3.8.

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[1] Weiss v. United States, 510 U.S. 163, 176 (1994).
[2] *Id.* (quotation marks omitted).
[3] *Id.*
[4] 2005 Manual for Courts-Martial (MCM), Part I, ¶ 2(b)(2).

b. The discovery order fails to address or create any "due diligence" standard applicable to the government to discover evidence. [*See United States v. Williams*, 50 M.J. 436, 441 (CAAF 1999)].

c. The Military Commission regulations and the discovery order fails to reflect an obligation upon the Prosecution to assist, if requested by the Defense, in obtaining access to evidence "which is material to the preparation of the Defense." (*See* RCM 701(a)(2), and addressed in *Williams* as well).

d. The discovery order's requirement that the Defense disclose to the Prosecution potential defenses, the disclosure of which is not required under courts-martial practice.

The belief that the discovery order issued in this case can serve as an adequate substitute for the years of case law, including appellate review, regarding issues relating to discovery – a rich history that has resulted in defining discovery procedures and obligations – demonstrates how little respect this Military Commission affords military courts-martial practice. The failure of the orders and instructions governing this Military Commission to address the discovery process adequately presents another glaring example how this Military Commission system fails to provide a comprehensive and consistent set of rules. Such a situation deprives Mr. Barhoumi of a full and fair trial.

In light of the foregoing, the Defense requests that this Military Commission adopt the discovery rules and procedures employed in courts-martial practice and the applicable case law relevant thereto and modify the discovery order to reflect such an adoption. In the alternative, the Defense requests that this Military Commission modify the discovery order in the following manner:

a. To modify the first and second sentences of paragraph 3 to read, "The times set forth below apply to any matter known to exist, reasonably believed to exist, or which would be known through the exercise of due diligence, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist or initially discovered through the exercise of due diligence on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists."

b. To add at paragraph 14, "The Prosecution shall, as soon as practicable, disclose to the Defense the existence of evidence known to the Prosecution which reasonably tends to (a) negate the guilt of the accused of an offense charged; (b) reduce the degree of guilt of the accused of an offense charged; or (c) reduce the punishment."

c. To add at paragraph 14, "The Prosecution must exercise due diligence in reviewing the files of other government entities to determine whether such files contain discoverable information. The core files that must be reviewed include the Prosecution's files in the case at bar. Beyond those materials, the Prosecution has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including any and all investigating agencies acting on behalf of the United States."

d. To add at paragraph 14, "The Prosecution shall, upon request by the Defense, permit and assist the Defense to inspect (a) any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of United States government authorities, and which are material to the preparation of the Defense or are intended for use by the Prosecution as evidence in the

Prosecution case-in-chief at trial, or were obtained from or belong to the accused; and (b) any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of United States government authorities, the existence of which is known or by the exercise of due diligence may become known to the Prosecution, and which are material to the preparation of the Defense or are intended for use by the Prosecution as evidence in the Prosecution case-in-chief."

e. To delete paragraphs 15e, 15f, and 15g.

f. To add at paragraph 15, "The Defense shall notify the Prosecution before the beginning of trial on the merits of its intent to offer the defense of alibi or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the Defense shall disclose, in the case of an alibi defense, the place or places at with the Defense claims the accused to have been at the time of the alleged offense. If an intention to rely upon either an alibi defense or defense of lack of mental responsibility is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not admissible against the accused who gave notice of the intention."

7. **Oral argument.** The Defense requests oral argument on this motion.

8. **Witnesses and evidence.** None.

9. In making this motion, or any other motion, Mr. Barhoumi does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

WADE N. FAULKNER
Captain, US Army
Detailed Defense Counsel

LEE D. FOREMAN
[redacted]

UNITED STATES OF AMERICA	**DEFENSE**
v.	Motion for Appropriate Relief Transfer of the Accused as Punishment for Cooperation in Commission Proceedings
SUFYIAN BARHOUMI	**11 April 2006**

1. This Motion is filed by the defense in the case of *United States v. Sufyian Barhoumi.* This motion is filed outside the timelines set by the Presiding Officer in the email from the Assistant to the Presiding Officer dated 14 March 2006. The reason for the late filing is that the Defense only discovered the basis for this motion during the most recent trial term of 3-7 April.

2. **Relief Requested.** The Defense requests that the Presiding Officer order the return of Mr. Barhoumi to Camp 4 or another detention facility of the same or lesser security for the remainder of commission proceedings.

3. **Synopsis.** The evidence will show that Mr. Barhoumi is being administratively punished for his cooperation with the military commission process and this Presiding Officer. As such, he is entitled to immediate return to Camp 4 and such other relief as the Presiding Officer may deem appropriate.

5. **Facts.**

a. From approximately April 2005 until 30 March 2006, Mr. Barhoumi resided in Camp 4 at Guantanamo Bay. Army Brigadier General Jay Hood, former commander of Joint Task Force Guantanamo, has stated, "Everyone here knows about Camp 4, and

everyone wants to be [there]." Military news articles describing Camp 4 in detail are attached as Exhibit A.

b. On 30 March 2006, approximately 10 days after the Chief Defense Counsel received an application for inclusion into the qualified pool of civilian attorneys from Mr. Lee Foreman, Mr. Barhoumi was transferred to Camp 5. Mr. Barhoumi has previously indicated in a session of this commission that he desired Mr. Foreman as an attorney. Camp 5 is a "stat-of-the-art prison" where detainees are held in solitary confinement. "Thick steel airlock doors clang shut with a hiss and an echo as guards move through the cellblocks," states a military article describing the high security Camp 5 facility. Military news articles describing Camp 5 in some detain and including a photo, are attached as Exhibit B.

c. Mr. Barhoumi is now detained at Camp 5. He has been held in continuous custody of military forces of the United States since approximately April 2002. In the prior session of the commission in February, Mr. Barhoumi cooperated fully and respectfully. On 30 March 2006, just days after the application by Mr. Foreman and days before his detailed defense counsel was to arrive at Guantanamo Bay, he was transferred from Camp 4 to Camp 5. He did not engage in any misconduct prior to his transfer, and he has not been interrogated since his transfer to Camp 5.

d. Before his transfer, Mr. Barhoumi was detained at Camp 4, where he lived communally in an open facility in which there were frequent opportunities for access to the grounds outside, exercise and occasional access to books. Because the sink in the cells in Camp 5 are of a type where a button must be pushed continuously in order to obtain water, Mr. Barhoumi is unable to operate the sink appropriately. Mr. Barhoumi

does not have a left hand. What remains is only a small portion of a finger, with little range of motion. He is unable to operate the sink with his left hand and must do so with his right hand. Unfortunately, his left hand does not allow for him to collect water and properly bathe or clean himself.

e. Mr. Barhoumi has rarely seen the light of day since his transfer to Camp 5. He is given exercise time only in the early morning hours, prior to dawn.

f. In an interview with the Commander, Joint Detention Group, Colonel Michael Bumgarner and in his affidavit (Exhibit C) dated 6 April 2006, Colonel Bumgarner explains that all detainees facing commission (except al Bahlul and al Sharbi) were moved to Camp 5. He cites various reasons including compliance with Army regulations, the downsizing of manpower within his organization, and Mr. Barhoumi's safety. Also according to Colonel Bumgarner, Camp 5 has been in existence since approximately April 2005, and Camp 4 is not scheduled to be eliminated at the current time.

6. **Argument.**

a. The transfer of Mr. Barhoumi to Camp 5 just days after his requested civilian attorney submitted an application to the Chief Defense Counsel and just days before his detailed defense attorney was scheduled to arrive in Guantanamo Bay was without justification based on his conduct, and was retaliatory for his cooperation before this body. This retaliatory transfer by detention authorities prejudicially impedes his ability to participate in his own defense. Further, retaliatory transfer prejudicially impeded the ability of his counsel to develop a trusting relationship with their new client and constitutes affirmative government interference in the attorney-client relationship.

b. First, it is clear that Mr. Barhoumi's transfer was because he has cooperated in military commission proceedings. The Prosecution does not contest that Mr. Barhoumi and seven other detainees were transferred to Camp 5 on or around 30 March 2006. Two detainees – al Bahlul and al Sharbi – were not transferred. Those two who were not transferred have resisted all cooperation with the commission process, as evidenced by the transcripts and filings in their cases, all of which are part of what is referred to by the commission as commission law, of which the commission can take final notice under existing POMs. The same is true as the identity and pendancy of commission proceedings against the eight cooperative detainees. This systematic transfer of all but the two uncooperative detainees makes it clear that the transfer of Mr. Barhoumi was not for his safety or protection but for isolation and constructive punishment t for the polite exercise of his right to an allegedly full and fair hearing before this commission.

c. There is no basis for moving Mr. Barhoumi to Camp 5. All of the stated reasons by Colonel Bumgarner are not applicable to this case. Colonel Bumgarner cites Army regulations that require pretrial prisoners be separated from post-trial prisoners. Everyone at Guantanamo is in a pretrial status. None have been tried. Colonel Bumgarner also says that manpower downsizing is requiring the consolidation of certain camps. However, Camp 4 is not scheduled to close and Camp 5 has been in existence for about one year. Surely, the movement of one detainee from Camp 5 to Camp 4 will not unduly burden any manpower shortages at Camp 4. Presumably more people will be moved in to both Camp 4 and Camp 5. Finally, Colonel Bumgarner notes that Mr. Barhoumi's safety is of great concern. Colonel Bumgarner relies on a theory that since Mr. Barhoumi will be appearing before a tribunal, he may have incentive to testify

against others in Guantanamo and thus, his safety might be in question. However, Mr. Barhoumi has been facing this commission since charges were approved in November 2005. He has been in Camp 4 since approximately April 2005 and has not been the target of any acts of violence. Camp 5 has been in existence for almost one year. If Mr. Barhoumi's safety were such a concern, why was he not moved when charges were approved by the Appointing Authority?

c. Mr. Barhoumi's mental and physical well-being are so profoundly affected by his transfer to Camp 5 that his is affirmatively and prejudicially impeded from participating in his own defense. He is unable to properly bathe himself because of his left hand and his attitude is growing increasingly uncooperative.

d. "Commission law" clearly includes international law. In the decision of the Appointing Authority in United States v. Hamdan and United States v. Hicks, Appointing Authority Decision on Challenges for Cause, Decision No. 2004-001, 19 October 2004, available at http://www.defenselink.milk/news/Oct2004/d22041021panel.pdf, General Altenburg made extensive direct use of international law in his decision. See, especially, pp. 8-9. The Appointing Authority used authority from the European Court of Human Rights to support his position. Id. Less than three weeks ago, and only nine days before Mr. Barhoumi's transfer from Camp 4 to Camp 5, the Inter-American Commission on Human Rights, the human rights body directly involved in oversight of human rights violations in the Americas, asked the United States to government to seek precautionary measures to protect one of the detainees during his detention at Guantanamo. The Inter-American Commission went on to say that "prolonged incommunicado detention" "fail[s] to comply with international standards of humane treatment." See Exhibit D.

e. In a long line of cases, the United States Supreme Court and lower federal courts have recognized that direct governmental interference with the right to counsel is a *per se* violation of the right to counsel. United States v. Cronic, 466 U.S. 648 (1984); Perry v. Leeke, 488 U.S. 272 (1989); Shillinger v. Haworth, 40 F.3d 1132 (10th Cir. 1995). This occurs when the government has so pervasively interrupted the attorney-client relationship that the defense is unable to perform its function. In such cases, prejudice is presumed and no harmless error standard applies. This should be no less true in commission proceeding than in federal criminal proceedings, since the right to counsel in these proceedings is at least as important, if not more important than the ability of detailed military defense counsel, who have no choice in appearing on behalf of Mr. Barhoumi, to begin to build a trusting relationship with their new client. Mr. Barhoumi is under the absolute control of the government in at least three critical respects: with regard to his confinement, with regard to his trial, and with regard to his legal representation. Here, the very same military that detains Mr. Barhoumi provides him with counsel. Both wear the same uniforms, whether they meet as counsel or serve as his guards in Camp 4. Here, interference by the government in the attorney-client relationship, particularly at its outset, is so pervasive that counsel must overcome nearly insurmountable obstacles. The government has effectively denied Mr. Barhoumi his right to counsel.

f. Article 13 of the UCMJ (10 USC §813) provides as follows, "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to ensure his

presence, but he may be subjected to minor punishment during that period for infractions of discipline," Approximately one month ago, a military appeals court held that, when dealing with pretrial detainees, it would "scrutinize closely any claim that maximum custody was imposed solely because of the charges rather than as a reasonable evaluation of all the facts." Maximum custody is arbitrary when it is unnecessary to assure presence at trial or is unrelated to security needs. United States v. Crawford, 2006 CAAF LEXIS 251 (2006). Moreover, the Due Process clause of the Constitution requires that conditions of confinement satisfy certain minimal standards for pretrial detainees. Bell v. Wolfish, 441 U.S. 520, 535, n. 16 (1979).

g. Mr. Barhoumi is entitled to be returned to Camp 4 for the duration of commission proceedings unless some reason other than the pending charges against him or "smoother camp operations" requires different treatment. A federal court can order that he be returned to the general population. Hamdan v. Rumsfeld, 344 F.Supp. 2d 152 (D.D.C. 2004)(order attached at 173-174). This commission should order no less.

7. **Oral Argument** is requested.

8. **Witnesses and Evidence**. Exhibits A through D are attached. The Defense requests testimony from Colonel Bumgarner.

By: _____
WADE N. FAULKNER
CPT, JA
Detailed Defense Counsel

Exhibit A

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

New Guantanamo Camp to Pave Way for Future Detention Ops

By Donna Miles
American Forces Press Service

NAVAL STATION GUANTANAMO BAY, Cuba, June 28, 2005 – For a glimpse at what's ahead for the detention facility here for enemy combatants, look no farther than Camp 4, one of five camps that make up Camp Delta here along Radio Ridge.

Camp 4, the only medium-security camp at Guantanamo Bay, is the most sought-after camp here for detainees here. It's reserved only for those who live by the camp rules and offers them the privilege of living in a communal setting that offers more freedoms and perks than less-cooperative detainees receive.

Army Brig. Gen. Jay Hood, commander of Joint Task Force Guantanamo Bay, said the camp is proving so successful in encouraging detainees to cooperate with camp rules that he's incorporating lessons learned here in Camp 6, a new, permanent facility to be built here.

"Everyone here knows about Camp 4, and everyone wants to be here," Hood told military analysts who traveled here June 24 to observe detention operations.

Camp 4 offers a wide range of incentives for good behavior. It features a common area that allows detainees to eat, sleep and pray together, Hood explained. Instead of the unpopular orange jumpsuits less cooperative detainees wear, those in Camp 4 wear white clothes that represent something of a status symbol among the detainee population. They get seven to nine hours a day outside their living quarters for recreation. Instead of having their meals delivered to their cells on a tray, they get containers of prepared food that they dish up and eat family-style.

Detainees at Camp 4 get access to volleyball nets and ping-pong tables and are treated to ice cream every Sunday, Hood said. They can request copies of the National Geographic magazines they love and occasionally get to watch Arabic family TV shows and soccer highlights. And five times a day, when the Muslim call to prayer sounds over the camp's speaker system, they get to pull out their prayer rugs, orient them with arrows throughout the camp that point toward Mecca, and pray as a group.

"One thing that is really different in this camp is that we have a working relationship with these people," said Chief Warrant Officer Tom Peal, officer in charge of the camp. "We're here to make them feel as comfortable as possible."

Hood stressed that entree to Camp 4 is not based on how forthcoming a detainee is during interrogations. The price of admission to the camp is simply following camp rules.

"There's a big incentive for detainees to want to be here," said Command Sgt. Maj. Anthony Mendez. In fact, during the two years that he's served at Guantanamo Bay, Mendez said he's seen only about 10

detainees get transferred to another camp for bad behavior.

Less cooperative detainees - those who spit at or throw urine and excrement at guards, refuse to leave their cells when ordered to or break other camp rules - live in four other camps, all with more restrictions.

A new facility that recently received funding, Camp 6, will build on successes at Camp 4 in promoting good behavior among detainees, Hood explained.

The camp, the second permanent facility to be built here, will provide a living environment more suitable to long-term detention, officials said. It will offer more communal living, increased access to exercise areas, activities, mail and foreign-language materials, and enhanced medical facilities.

Other perks will be offered depending on detainees' behavior. "We'll be able to ratchet it up or down, based on (a detainee's) compliance," Hood said.

Hood said experience at Guantanamo Bay demonstrates that it generally works to everyone's advantage when there's cooperation on both sides. Detainees are less violent. Guards are safer. Interrogators are more able to build rapport and gather intelligence.

In running a detention facility, "there has to be some give and take," Hood said.

"We're going to treat these detainees humanely. That's the bottom line. But we also want to find some ways to establish rapport and promote cooperation," he said. "That's the best way for us to accomplish our mission here."

Related Site:
Naval Station Guantanamo Bay, Cuba

News Archive

http://www.defenselink.mil/news/Jun2005/20050628_1890.html

Exhibit B

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

Commander Leads Gitmo Guard Force Through Challenges

By Sgt. Sara Wood, USA
American Forces Press Service

NAVAL STATION GUANTANAMO BAY, Cuba, March 31, 2006 – Navy Cmdr. Catie Hanft knows she asks a lot of the sailors and soldiers she commands. They work 12- to-14 hour shifts in intense heat, dealing with a difficult group of people from a culture foreign to them, all the while knowing their work is under international scrutiny.

But with a focus on leadership, Hanft, deputy commander of the Joint Detention Group and commander of the Navy Expeditionary Guard Battalion here, is bringing her troops past these challenges to a place where they are fulfilling their mission and contributing to the fight against terrorism.

"Being down here is the right thing to do," Hanft said. "Seeing how hard the sailors and soldiers work, I know we're doing a good job."

The roughly 500 sailors in the Navy Expeditionary Guard Battalion provide security inside Camp Delta, the main detention facility here. An additional 400 to 450 soldiers provide security for other smaller camps and Camp 5 -- the newest and most high-security facility -- as well as external security outside the camps.

Navy Cmdr. Catie Hanft, deputy commander of the Joint Detention Group and commander of the Navy Expeditionary Guard Battalion at Guantanamo Bay, Cuba, stands in a display of a typical compliant detainee cell at Camp Delta, Naval Station Guantanamo Bay, March 30. Photo by Sgt. Sara Wood, USA

In all the facilities, guard force troops face unique challenges when dealing with the detainees, Hanft said. Detainees who have been here for a long time and are frustrated and depressed often act out against the guards by assaulting them, throwing things at them or calling them names, she said.

Guards are not allowed to react to detainee outbursts, but are relieved from their posts and taken care of while the detainee is put in segregation as punishment, Hanft said. This has been a challenge for her troops, she said, because they cannot give in to their natural inclination to defend themselves when attacked.

"I ask young sailors to put aside their personal political beliefs and to reach deep into their ethical beliefs, and to look past the differences and problems, and to be humane," she said. "That's a big challenge, to do that on a daily basis."

The long hours also are taxing on the guard troops, Hanft said, especially when they're required to

keep their composure at all times and use interpersonal skills to work with the detainees and foster cooperation. Servicemembers receive cultural training before reporting here, but the Muslim culture isn't something that can be learned overnight, she said.

"No matter how much you tell a person what they can expect, they won't fully understand until they come down here and see the reality and live the reality day to day," she said.

A negative worldwide perception of detention procedures at Guantanamo Bay has been a challenge for her troops to overcome, Hanft said. These troops have sacrificed a year of their lives to leave home and serve their country, doing a very arduous duty, and it's hard for them to hear criticisms and accusations leveled at them in the United States and abroad, she said.

"It's very hard on them to know that they are volunteering -- they are sacrificing their families and themselves -- to come down to a place that many people don't understand and that many people criticize," she said.

Many criticisms of Guantanamo Bay occur because people haven't visited the facilities and witnessed detention procedures, Hanft said. "Until you really fully understand what's going on down here and see what's going on down here on a daily basis, then you can't really comment on it," she said.

The Guantanamo Bay leadership is constantly making improvements to make detainee operations better, Hanft said. The detainees' menu was recently changed to a more Mediterranean-style cuisine to suit their preferences, and detainees have a choice of four different meal plans, she said.

As always, all detainees are given basic issue items and afforded the right to practice religion, Hanft said. Compliant detainees are given comfort items, such as games, library books, and pens and paper, she said. Highly compliant detainees are allowed to live communally, sharing meals and recreation, and spend more time out of their cells, she said.

Female guards perform the same duties as their male counterparts, with one exception, Hanft said. When a detainee is showering at the end of the cellblock, female guards cannot go more than two-thirds of the way down the block, she said. Also, when detainees are using the bathroom facilities in their cells, they are allowed to cover themselves with a sheet or exercise mat.

Legal procedures being put in place for these detainees are ones the U.S. government has never had to employ before, so there are many issues to work out, Hanft said. While that system is being developed, the servicemembers at Guantanamo Bay have been charged to safely, securely and humanely detain the suspected terrorists, and they are doing so with integrity and discipline, she said.

"The American people need to trust that the military, who they've turned to before in times of need, are doing what they need to do," she said.

Related Site:
Joint Task Force Guantanamo

Related Article:
Outgoing Commander Reflects on Guantanamo Mission

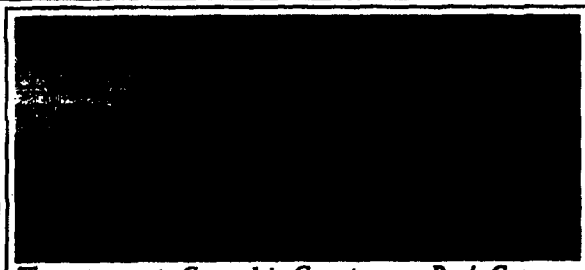
News Archive

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

Detainees Living in Varied Conditions at Guantanamo

By Kathleen T. Rhem
American Forces Press Service

NAVAL BASE GUANTANAMO BAY, Cuba, Feb. 16, 2005 -- The detainee population at the U.S. naval base here is a diverse group. The roughly 545 detainees hail from some 40 countries and speak at least 17 different languages.



The entrance to Camp 1 in Guantanamo Bay's Camp Delta. The base's detention camps are numbered based on the order in which they were built, not their order of precedence or level of security. Photo by Kathleen T. Rhem
(Click photo for screen-resolution image); high-resolution image available.

But nearly as diverse as the individuals themselves are the conditions in which they're held.

Since U.S. officials began holding enemy combatants here in January 2002, an elaborate system to manage those detainees in a humane manner, protect guards and maximize intelligence has evolved here.

Today, prisoners are divided into four levels, based on how well they comply with camp rules, explained a senior Navy petty officer serving here.

Navy Master Chief Petty Officer Tracy Padmore, an aviation maintenance technician from Naval Air Station Jacksonville, Fla., explained that detainees are placed in levels based solely on how well they cooperate with guards' instructions. "(The levels) have nothing to do with what a detainee's (intelligence) value is or what he might say or do in an interrogation booth," he said.

"Humane" and "consistent" seem to be watchwords for members of the joint task force here. Anyone working with detainees uses these words right off the bat when describing what they do. Guards and officers at Guantanamo consistently appear genuinely offended when asked about allegations in the civilian media about detainee abuses at Guantanamo Bay.

"I'm not here to say we're all perfect," Padmore said. "But these young men and women carry out their duties in a highly professional manner." He added that when minor infractions of the rules by guards have occurred, they've been punished swiftly.

"Detainees here at Guantanamo are treated in a humane manner at all times by the security folks and the intelligence folks who work with them," Army Brig. Gen. Jay Hood, commander of Joint Task Force Guantanamo, said.

He said all JTF members are strongly focused on their mission, "the safe, secure, humane custody of the detainees under our charge."

Hood explained that information collected since the detainees have been held here has helped officials learn how best to handle the detainees' continued detention and to design suitable facilities.

Level 1 detainees wear white "uniforms" and share living spaces with other detainees. At the other end of the spectrum, Level 4 detainees wear orange, hospital scrub-type outfits and have fewer privileges.

Padmore, who is assigned to Joint Task Force Guantanamo based on prior corrections experience, described a typical Level 1 detainee as "compliant and willing to follow camp rules." Whereas, Level 4 detainees generally "have a litany of offenses," from threatening other detainees or guards to hurling bodily fluids at guards or refusing to come out of the cell when ordered.

To a certain extent, the level a detainee is placed in determines where he is housed, as well. Most Level 1 detainees are afforded extra privileges in Camp 4. (Camps are numbered based on the order in which they were built, not their order of precedence or level of security.)

Gone are the days of concrete slabs and open-air chain-link enclosures in Camp X-Ray. Hood explained that Camp X-Ray was a hastily built structure to deal with a rapidly changing situation in the war on terrorism and that the facilities there were never meant to be used for long-term detention. Engineers began construction on Camp Delta, which replaced Camp X-Ray in April 2002, shortly after detainees began arriving here, he said.

In Camp 4, part of Camp Delta, detainees live in 10-man bays with nearly all- day access to exercise yards and other recreational privileges.

Sgt. 1st Class Todd Rundle, an Army Reserve military police officer, explained that Camp 4 is Camp Delta's only medium-security facility. Doors in the camp are normally opened with keys, but a mechanical override can be controlled from inside the centrally located "Liberty Tower," the camp's command post, in an emergency.

Detainees generally are allowed out in exercise yards attached to their living bays seven to nine hours a day. Exercise yards include picnic tables under cover and ping-pong tables. Detainees also have access to a central soccer area and volleyball court.

Rundle said the large amount of outdoor time is a huge incentive for detainees to want to be transferred to Camp 4, which is based on good behavior. "The increased incentive of the additional time out here, that's a big thing for detainees to be able to come out for that duration of time over the course of every single day of the week," he said.

Part of the rationale behind the living arrangements at Camp 4 is to rebuild detainees' social skills, "which might have been lost over time," Rundle said. Detainees are provided games -- chess, checkers and playing cards are the most requested items -- and are responsible for keeping their own living areas clean.

They also eat meals together within their cellblocks. Food-service personnel bring the food, always culturally sensitive, and detainees apportion it among themselves at mealtime. Padmore said a guard always supervises so "Detainee A is not getting three plates while Detainee B gets none."

Books and other reading material are available during periodic visits from a designated librarian. A security official explained Agatha Christie books in Arabic are very popular and that camp officials are working to get copies of the Harry Potter books in Arabic.

Also in Camp 4, detainees are issued a full roll of toilet paper each week. In other camps detainees have to ask guards to apportion toilet paper when they need it. Padmore said many people take toilet paper for granted and that the detainees in Camp 4 value having their own supplies.

Other privileges unique to Camp 4 include electric fans in the bays, ice water available around the clock, plastic tubs with lids for the detainees to store their personal items, and the white uniforms. White is a more culturally respected color and also serves as an incentive to detainees in other camps.

"It's almost like a status symbol," he said. "Detainees come past and see detainees from Camp 4 playing volleyball, playing soccer or in white uniforms. The hope is that other detainees will play by the rulebook and aspire to get to Camp 4 to get those privileges afforded to them."

Not too far away, in Camp 1, some detainees are just one step away from being moved to Camp 4. They wear tan uniforms and are afforded such comfort items as prayer rugs and canvas sneakers. Many of these detainees are being considered for transfer to Camp 4, Rundle said.

Detainees in Camp 1 are housed in individual cells with a toilet and sink in each cell. The have 30 minutes in one of two exercise yards at the end of each cellblock twice a week, Padmore explained. Showers are allowed in outdoor shower stalls after exercise periods.

There are 10 cellblocks with 48 cells each, but guards generally don't fully populate the cellblocks to minimize the guard-to-detainee ratio.

Movement into and within the camp is funneled through "sally ports," entrances and passageways with two gates. One gate must be closed before the next can be opened. Military police officers man each sally port from inside.

Each detainee gets basic items such as a "finger toothbrush" -- short and stubby so it can't be used as a weapon -- toothpaste, soap, shampoo, plastic flip flops, and cotton underwear, shorts, pants and a shirt.

Guards are not allowed to remove basic items, but comfort items can be taken away for behavior infractions. Comfort items can include such simple things as Styrofoam cups and caps to the water bottles.

Some seemingly innocent items are kept from detainees to prevent them from harassing guards. For instance, sport tops on water bottles can make it easier for detainees to shoot bodily fluids onto guards, Padmore said.

The most recently completed detention facility, Camp 5, is a state-of-the-art prison that many states would envy. The $16 million facility, completed in May 2004, is composed of four wings of 12 to 14 individual cells each.

The two-story maximum-security detention and interrogation facility can hold up to 100 people and houses Level 4 detainees and those deemed to be the most valuable intelligence assets. The camp is run from a raised, glass-enclosed centralized control center that sits in the middle of the facility, giving the MPs a clear line of sight into both stories of each wing. Army National Guard Maj. Todd Berger called the control room "the nerve center of the camp."

Berger, who in civilian life is a state trooper in New Jersey, explained that all detainee movement in Camp 5 is monitored and controlled through touch- screen computers in the control center.

Thick steel airlock doors clang shut with a hiss and an echo as guards move through the cellblocks. In Camp 5, media and other visitors are not permitted to tour occupied cellblocks. The modern facility features some cells equipped with overhanging sinks and grab bars on the toilets for detainees with a physical disability and 10-foot-by-20-foot outdoor exercise yards that detainees generally have access to for an hour every day.

Camp rules are posted in four languages -- Arabic, Farsi, Urdu, and Pashto -- in the exercise yards in each of the camps. Recently, the enclosed bulletin boards have also featured posters with information about the Afghan elections. "It talks about the fact that 10 million Afghanis freely elected their own government," Rundle said. "So it's a bit of news from home ... for a chunk of the detainee population here."

Cultural sensitivity is consistently practiced in each of the camps. Respect for Islam is evident in many of the policies. For instance, in each cell in Camp 1, a Koran is stored hanging in a surgical mask from the cell wall. The purpose of the surgical mask is to hold the Muslim holy book "in a place of reverence," Padmore said.

In each cell block a painted arrow points toward Mecca, Saudi Arabia, so the detainees know which way to face during their daily prayers. During Ramadan, detainees were allowed to break their daily fast with water and dates at the appropriate time, and prayer calls are broadcast over loudspeakers five times a day.

Regardless of his assigned level or camp, no detainee is considered to be more or less dangerous than another. "I can't say who's dangerous and who's not," Padmore said. "I consider them all dangerous people because they're here."

Related Site:
Joint Task Force Guantanamo

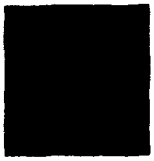
A Koran hangs in a surgical mask in Camp 1. The Muslim holy book is hung up on the wall to give it a place of reverence. Photo by Kathleen T. Rhem

High resolution photo

Two detainees in white "uniforms" stand in the doorway of their bay in Camp 4. To a certain extent, a detainee's level is determined by where he is housed, as well. Most Level 1 detainees are afforded extra privileges in Camp 4. Photo by Kathleen T. Rhem

High resolution photo

Detainees walk in an exercise yard in Camp 4, where they live in 10-man bays with



nearly all-day access to the yard and other recreational privileges. Photo by Kathleen T. Rhem

High resolution photo

High resolution photo

This view shows an unoccupied wing in the state-of-the-art Camp 5, a $16 million facility completed in May 2004. Photo by Kathleen T. Rhem

High resolution photo

News Archive

http://www.defenselink.mil/news/Feb2005/n02162005_2005021604.html

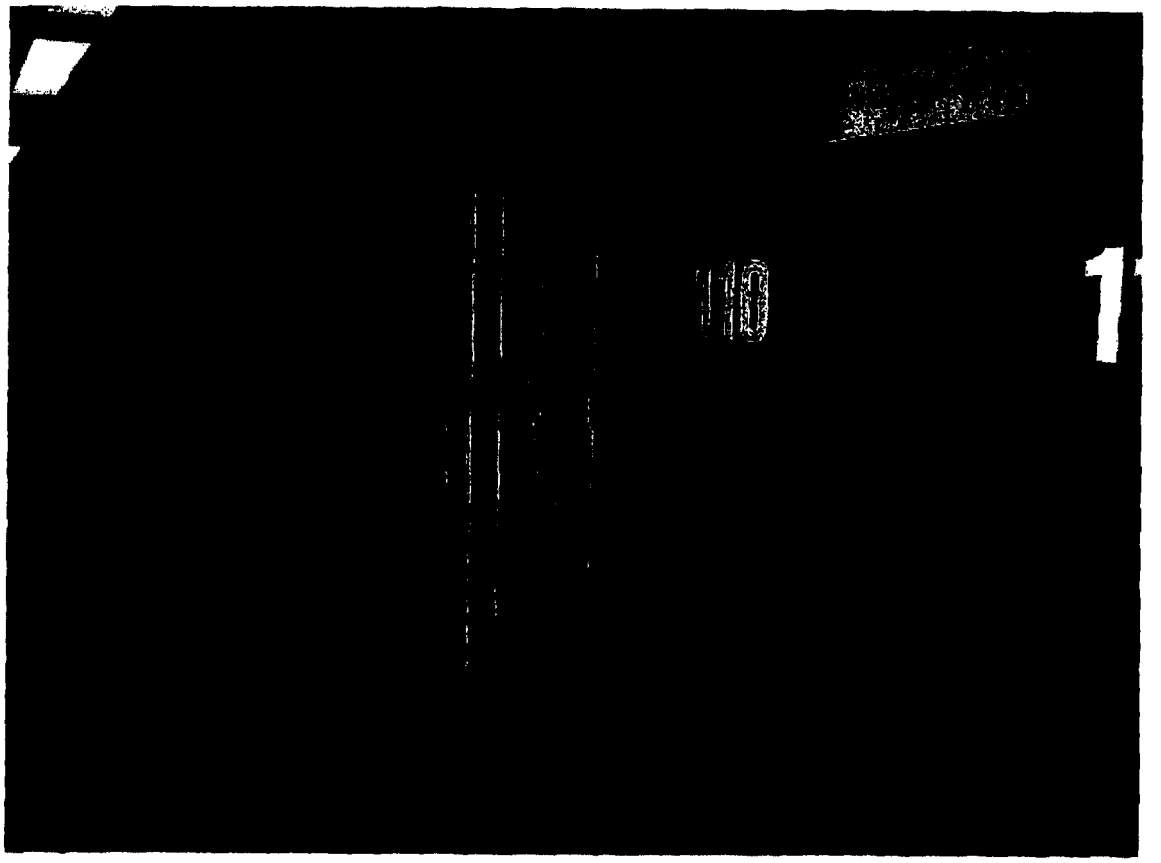


Exhibit C

AFFIDAVIT

I, Colonel Michael I. Bumgarner, United States Army, under the penalties of perjury, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

I am a Colonel in the United States Army with over twenty four (24) years of active duty service as a Military Policeman . I am currently assigned as the Commander, Joint Detention Group, for the Joint Task Force Guantanamo, Guantanamo Bay, Cuba. As Detention Group Commander, I am responsible for all aspects of detention operations associated with the care and custody of Enemy Combatants from the Global War on Terror that are being held at U.S. Naval Station, Guantanamo Bay, Cuba. I have served in this position since April 2005. I answer directly to the Joint Task Force Commander, RDML Harris, or the Deputy Commander, BG Leacock.

It is my responsibility, among others, to see that the detention mission is performed in a humane manner that protects the safety and security of the detainees, and the safety of security personnel at JTF-Guantanamo. I am completely familiar with all of the detention areas within the Joint Task Force, including the actual structure and conditions within each area, and the policies and procedures for detention operations in each of those areas.

As of approximately 30 March 2006, eight of ten Enemy Combatants charged with war crimes and scheduled to appear before a military commission have been co-located together on a tier of one of the newest detention camps, known as Camp 5. The other two charged detainees are housed in a different facility. It is my intention to move the remaining charged commissions defendants to this same location when operationally feasible.

Prior to co-locating the charged detainees on the same tier of Camp 5, they were spread out across the camps, living in a number of different facilities. For example, three were living in Camp 4 (including Detainee Khadr), three were living in Camp 3, one in Camp 5. The living conditions of the various charged detainees varied, depending on which camp they were in.

Camp 5 is an American Corrections Association certified maximum-security detention facility. It was designed after a federal maximum-security facility in Indiana. The charged commissions detainees are held in one tier within the same wing of the Camp 5 facility. On this tier, there are 12 cells, of which eight are occupied by the charged detainees.

I am familiar with the American Corrections Associations standards and, with respect to the conditions of the detention, neither Detainee Khadr nor the other commissions detainees are segregated, held in isolation, or in solitary confinement. The charged detainees are held in individual concrete cells. The cells are not audio isolated and there is no effort made to disrupt any communication between the detainees from within their cells. They are allowed to participate in daily prayers, which occurs five times each day, and one of the detainees leads those prayers. The tier in which they are housed also has a reading room for the detainees' use on a scheduled periodic basis.

Each detainee is allowed two hours of recreation a day. The recreation fields are divided into eight sections, separated by a link fence. They are able to communicate with each other, but cannot physically touch each other or play games, such as soccer. Six of the detainees participate in recreation at the same time. Two detainees participate in recreation activities in the newer recreation yard. Each recreation yard has physical exercise equipment, such as an eliptical machines for cardio-vascular exercise.

By comparison, Camp 4 is a medium-security, communal living facility in which detainees reside in open bays, with ten detainees per bay. They are able to recreate in groups, including having the opportunity to play games such as soccer, basketball or even chess.

I supported and approved the decision to co-locate the charged detainees within the same tier of Camp 5. I then recommended the movement to the then-Joint Task Force Commander, MG Hood. He approved the decision and the relocation was made. This decision was well-advised and carefully thought out. Input from senior leaders within the Joint Detention Group was obtained in consideration of this decision. It was not arbitrary. The movement was not and does not punish the charged detainees. Furthermore, it was not done to affect the commissions process, and it in fact does not.

There were two primary reasons why the charged individuals were moved to the same wing of Camp 5. First, JTFGTMO is consolidating detainee operations due to a variety of factors, including a reduction in personnel and the anticipation of opening the new detention facility, known as Camp 6, sometime later this year. Some camps are being shut down and others are being moved around. Moving the charged detainees to the same wing in Camp 5 helps manpower issues and makes for smoother camp operations.

Second, Joint Task Force Guanatanamo is trying to comply with AR 190-47 and AR 190-8, and sound correctional doctrine which recommend separating various classes of detainees, such as keeping pre-trial detainees separate from others and keeping detainees separated based upon the seriousness of the charged offenses. While it can be said that all of the detainees are pre-trial, the fact that ten individuals have been charged changes the operational security for their care and custody. Consistent with AR 190-47 and AR 190-8 separating the group from the uncharged individuals increases the safety and security of the facilities for all detainees and allows more efficient operation of the guard force.

Richard V. Bumgarner

MICHAEL I. BUMGARNER
Colonel, United States Army
Commander, Joint Detention Group
Joint Task Force Guantanamo

Executed on: 06 April 2006

[redacted] D

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME

ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

March 21, 2006

Ref: **Omar Ahmed Khadr**
Precautionary Measures N° 8-06
United States

Dear Professor Wilson:

On behalf of the Inter-American Commission on Human Rights, I write with regard to the above-cited request for precautionary measures relating to Mr. Omar Ahmed Khadr (hereinafter "O.K.").

I wish to inform you that during its 124th Regular Period of Sessions, the Commission considered your request for precautionary measures and , in a note of today's date, decided to address the Government of the United States in the following terms:

> As Your Excellency is aware, on March 13, 2006 during its 124th Regular Period of Sessions, the Commission convened a hearing in this matter in order to receive representations from O.K.'s representatives and the State as to whether the request for precautionary measures should be granted. After considering the written and oral submissions of the parties, the Commission has concluded that a serious and urgent risk of irreparable harm can be said to exist with respect to one aspect of the request for precautionary measures, namely the circumstances of O.K.'s conditions and treatment in detention.
>
> More particularly, the information presented by the Petitioners indicates that O.K. has been the victim of serious instances of mistreatment at the hands of interrogators and military personnel during his time in detention in Afghanistan and at Guantanamo Bay. It is alleged in this connection that O.K. was denied pain medication for injuries suffered during his capture, forced to remain in stress positions with both his hands and feet shackled for extended periods, physically assaulted during

Professor Richard Wilson
Washington College of Law
American University
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016

Fax: (202) 274-0659

interrogations, placed in a room with barking dogs with a plastic bag over his head, and threatened with rape.[1] O.K.'s representatives also allege that statements made by O.K. while he was subjected to torture or other cruel, inhuman or degrading treatment or punishment may be admissible and used against him in his criminal proceedings before the military commission.[2]

In its written and oral representations, the United States objected to the Commission's jurisdiction on the basis that the Commission lacks competence to issue precautionary measures in respect of states that have not ratified the American Convention on Human Rights or over matters arising under the laws of war, and that O.K.'s request is inadmissible for failure to exhaust domestic remedies.[3] Concerning the substance of the request, the State has not provided information with respect to the specific allegations raised by O.K. Rather, the State's oral and written observations indicate in general terms that the policy of the United States absolutely prohibits torture and requires all detainees to be treated humanely.[4] Similarly, in response to questions raised by the Commission during the hearing concerning whether the State has taken any measures to investigate O.K.'s allegations of abuse, the State's representative indicated that it was the policy of the United States to investigate all credible allegations of torture but otherwise declined to provide further information, citing privacy concerns. Further, the State failed to clarify whether statements that might have been obtained through torture or other cruel, inhuman or degrading treatment or punishment could be admissible or otherwise used against O.K. in his military commission proceeding, but rather referred the Commission to a military commission rule whereby the presiding officer may admit any evidence that "would have probative value to a reasonable person."

In considering O.K.'s request, the Commission has taken into account its findings in precautionary measures N° 259-02, which were adopted in March 2002 and subsequently maintained and extended in favor of all detainees at Guantanamo Bay. In those measures, as Your Excellency is aware, the Commission emphasized the clear and absolute prohibition of treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under applicable international norms.[5] The Commission also noted that according to longstanding inter-American jurisprudence, states must use the means at their disposal to prevent human rights violations and to provide effective remedies for any violations that do occur, including undertaking thorough and effective investigations capable of identifying and punishing persons responsible for human rights infringements.[6] In addition, the Commission stressed that measures to respect the right to humane treatment must include the prohibition against the use in any legal proceeding of statements obtained through torture or other cruel, inhuman or degrading punishment

[1] Request for Precautionary measures dated January 17, 2006, pp. 3-7.

[2] Request for Precautionary measures dated January 17, 2006, pp. 26-27.

[3] Initial Response of the State dated March 13, 2006, pp. 1-2.

[4] Initial Response of the State dated March 13, 2006, p. 3.

[5] Precautionary measures N° 259-02 (Detainees at Guantanamo Bay), Commission's letter to the United States dated July 29, 2004, pp. 2-3, citing IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (22 October 2002), p. 248.

[6] Precautionary measures N° 259-02 (Detainees at Guantanamo Bay), Commission's letter to the United States dated October 28, 2005, p. 11, citing I/A Court H.R., Velásquez Rodríguez Case, Judgment of 28 July 1988, Series C N° 4, paras. 172-174.

or treatment, except against a person accused of such conduct as evidence that the statement was made.[7]

The Commission has also taken into account its decision in precautionary measure N° 259-02 to reject the jurisdictional objections raised by the State, which were identical to those raised in the present request, whereby the Commission concluded that it has the authority to adopt precautionary measures in respect of non-states parties to the American Convention and to consider and apply international humanitarian law, and that an allegation of non-exhaustion of domestic remedies does not *per se* deprive the Commission of jurisdiction to adopt or maintain precautionary measures.[8]

In light of the above considerations and based upon the information available, the Commission hereby requests that the State take the urgent measures necessary to:

(1) ensure that O.K. is not subjected to torture or other cruel, inhuman or degrading punishment or treatment and is guaranteed his right to respect for his physical, mental and moral integrity. This should include measures to ensure that O.K. is not subjected to prolonged incommunicado detention or forms of interrogation that fail to comply with international standards of humane treatment.

(2) ensure respect for the prohibition against the use in any legal proceeding of statements obtained through torture or other cruel, inhuman or degrading punishment or treatment, except against a person accused of such conduct that the statement was made.

(3) conduct thorough and impartial investigations into O.K.'s allegations of torture and other ill treatment and to prosecute individuals who may be responsible for such conduct, including those who may be implicated through the doctrine of superior responsibility, in light of the State's obligation to ensure that detainees are not subjected to treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under applicable international norms.

The Commission also requested that the United States provide it with information concerning compliance with these precautionary measures within 15 days from the date of transmission of this correspondence.

[7] Precautionary measures N° 259-02 (Detainees at Guantanamo Bay), Commission's letter to the United States dated October 28, 2005, p. 11, citing UN Convention Against Torture, Article 15 (providing that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made"). See similarly International Covenant on Civil and Political Rights, Art. 14(3)(g); American Convention on Human Rights, Art. 8(2)(g), (3); Inter-American Convention to Prevent and Punish Torture, Art. 10.

[8] Precautionary measures N° 259-02 (Detainees at Guantanamo Bay), Commission's letter to the United States dated October 28, 2005, p. 8.

With respect to the remaining allegations in O.K.'s request concerning the conduct of his military commission proceedings, the Commission considers that these matters would be more appropriately addressed through its petition procedure, based upon the complexity of the issues raised and the possibility that an adoption of precautionary measures would determine the merits of those issues.

Sincerely yours,

Ariel Dulitzky
Assistant Executive Secretary

UNITED STATES OF AMERICA	**D 2 (Barhoumi)**
	PROSECUTION RESPONSE
	To Defense Motion for Appropriate Relief
	Objection to Presiding Officer's Discovery Order and Request for the Commission to Adopt the Discovery Rules and Procedure under Courts-Martial Practice
SUFYIAN BARHOUMI	**13 April 2006**

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Relief. The Defense motion should be denied.

3. Overview.

a. The Defense objects to the Presiding Officer's Discovery Order of 21 December 2005 (PO 2) and requests this Commission adopt the discovery rules, procedures and all relevant case law precedent applicable to trials by courts-martial. The Rules for Courts-Martial do no apply to this military commission, nor does the accused enjoy any Constitutional right to Due Process under the Fifth Amendment that would require the adoption of rules and precedent applicable to trials by courts-martial or United States district courts. Additionally, the President's constitutional war powers, the Authorization for Use of Military Force, 115 Stat. 224 [hereinafter AUMF], 10 U.S.C. §821 [hereinafter Article 21 of the U.C.M.J.] and 10 U.S.C. §836 [hereinafter Article 36 of the U.C.M.J.], grant the President the authority to prescribe the pre-trial, trial, and post-trial rules governing military commissions, and he has done so. Exercising his authority, the President determined that the discovery rules and procedures which govern criminal cases in the United States district courts shall not be used when trying alien enemy combatants for offenses cognizable under the law of war at military commissions. The Presiding Officer's Discovery Order and Military Commission Order No. 1 (5)(E) provide for a full and fair trial. There are many justice systems throughout the world that do not apply the rules for courts-martial or the rules and procedures applicable to criminal trials in United States district courts which still manage to dispense justice in a full and fair trial.

4. Facts.

a. On September 11, 2001, members of the al Qaida terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy.

b. One week later, Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons... in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *See* AUMF, *supra.*

c. On 13 November 2001, the President issued a Military Order, where, among other things, he found, "To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." President's Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter PMO]. Expressly relying on his authority as Commander-in-Chief under the Constitution, the AUMF, Article 21 of the U.C.M.J., and Article 36 of the U.C.M.J., the President directed, "any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed...." *See* PMO. In establishing military tribunals to adjudicate individuals alleged to have committed offenses under the law of war, the President, among others, made this specific determination:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, ***I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.*** (Emphasis added). *Id.*

The President further directed the Secretary of Defense, "as a military function," to "issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out..." the President's direction for military commissions. *Id.*

d. In Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, August 31, 2005 [hereinafter MCO 1] and subsequent orders and instructions issued under his authority, the Secretary of Defense established procedures for the appointment of military commissions and set forth various rules governing the structure, composition, jurisdiction, and procedures for military commissions appointed under the PMO. Specifically, regarding discovery, MCO 1 requires:

> The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the accused. *Id.*, at ¶5(E).

e. From or before 1998 through 2002, the accused, an Algerian citizen, trained, and then became an explosives trainer, at the al Qaida-affiliated Khalden Training Camp in Afghanistan.

f. By early March 2002, Abu Zubayda, Sufyian Barhoumi, Ghassan al Sharbi, Jabran Said Bin al Qahtani, and Binyam Muhammad had all arrived at a guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces. When captured on or about 28 March 2002, Barhoumi had begun conducting training with al Sharbi and al Qahtani.

g. The Accused was confirmed to be an enemy combatant by a Combatant Status Review Tribunal. All of the accused's criminal conduct is alleged to have occurred in Afghanistan and Pakistan. None of the accused's criminal conduct is alleged to have occurred in the United States.

h. In accordance with his military order, the President designated the accused in this case for trial by military commission on 6 July 2004. On 4 November 2005 the Appointing Authority approved the charges against the accused, and subsequently referred them to this Military Commission for trial in accordance with the PMO and the implementing directives, orders and instructions.

5. Legal Authority.

a. President's Military Order of November 13, 2001, 66 Fed. Reg. 57833.
b. Manual for Courts-Martial (2002).
c. Military Commission Order No. 1 (Aug. 31, 2005).
d. Department of Defense Directive 5105.70 (Feb. 10, 2004).
e. Military Commission Order No. 5 (Mar. 15, 2004).
f. *Duncan v. Louisiana,* 391 U.S. 145 (1968).
g. *Ex Parte Quirin*, 317 U.S. 1 (1942).
h. *Ex Parte Vallandigham*, 68 U.S. 243 (1863).
i. *Yamashita v. Styler*, 327 U.S. 1, 8 (1946).
j. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
k. *Lewis v. United States*, 518 U.S. 322 (1996).
l. *Madsen v. Kinsella*, 343 U.S. 341 (1952).
m. *Middendorf v. Henry*, 425 U.S. 25 (1976).
n. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
o. *Hamdan v. Rumsfeld,* 415 F.3d 33 (D.C. Cir. 2005).
p. *Reid v. Covert*, 354 U.S. 1 (1957).
q. *Kinsella v. Singleton*, 361 U.S. 234 (1960).
r. *Grisham v. Hagan*, 361 U.S. 278 (1960).
s. *McElroy v. Guagliardo*, 361 U.S. 281 (1960).
t. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
u. THE LIEBER CODE OF 1863.
v. The Modac Indian Prisoners, 14 Op. Atty Gen. 249 (1873).
w. Military Commissions, 11 Op. Atty Gen. 297 (1865).

6. Discussion

a. The Due Process Clause Of The Constitution Does Not Apply To Alien Enemy Combatants Being Tried Before A Military Commission For Offenses Arising Under The Law Of War.

(1) The Defense begins its motion arguing that the military commission process is bound by the constraints of the Due Process Clause found in the Fifth Amendment of the Bill of Rights in the Constitution. The Defense, however, fails to cite to any authority that holds the Due Process Clause is applicable to the military commission of an alien enemy combatant for offenses arising under the law of war. Conversely, there is a plethora of authority holding that constitutional guarantees under the Bill of Rights are not applicable to military commissions and historical practice and perception since the time the Constitution was drafted establish that there was an understanding that offenses cognizable under the laws of war were distinct, different, and treated separately from regular criminal offenses under the civil law. Military commissions or tribunals for violations of the law of war were not considered courts under Article III of the Constitution and since offenses cognizable under the law of war were not considered criminal offenses as contemplated by the Constitution, the protections afforded in Article III and the Fifth and Sixth Amendments did not, and do not, apply to trials by military commissions. Furthermore, historical practice and precedent establish that an alien enemy combatant who has never lawfully entered or resided in this country cannot avail himself to the protections in the Constitution or the Bill of Rights.

(2) In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court held that a United States citizen detained in the United States as an enemy combatant has a due process right to "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." [1] While it might follow that the Due Process Clause would apply to a military commission of a U.S. citizen for violations under the law of war, application of the Due Process Clause to an alien enemy combatant who has no lawful connection to the United States clearly does not follow from the *Hamdi* decision.

(3) Historically, it was understood that the Due Process Clause did not apply to military commissions convened to try any person for offenses cognizable under the laws of war.

> That portion of the Constitution which declares that "no person shall be deprived of his life, liberty, or property without due process of law," has such direct reference to, and connection with, trials for *crime* or *criminal* prosecutions that comment upon it would seem to be unnecessary. ***Trials for offences against the laws of war are not embraced or intended to be embraced in those provisions.*** (Bold and italics emphasis added, plain italics emphasis in original.).

Military Commissions, 11 Op. Atty Gen. 297 (1865). Since the time of our Country's founding, it was understood that offenses under the law of war were separate, distinct, and unlike criminal

[1] Hamdi at 2635.

offenses against the civil law, which fell under the protections of the Constitution. Trials of alien enemy combatants for violations under the law of war were by military tribunals that did not employ the same procedures used by the civilian criminal courts, developed through the civilian common law and subsequently enshrined in the Constitution. *See e.g. Ex Parte Quirin,* 317 U.S. 1, 39-40 (1942)(holding protections in the Fifth and Sixth Amendments not applicable in military commissions adjudicating violations under the law of war); *Ex Parte Vallandigham,* 68 U.S. 243, 251, 253 (1863) (stating military commission is not a court within the meaning of the Judiciary Act of 1789 nor is the authority exercised by a commission "judicial in that sense"); *Yamashita v. Styler*, 327 U.S. 1, 8 (1946) (citing *Vallandigham* and stating, "In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court."); *Cf. Middendorf v. Henry,* 425 U.S. 25, 49-50 (1976) (Powell, J., concurring) ("Court-martial proceedings, as a primary means for the regulation and discipline of the Armed Forces, were well known to the Founding Fathers. The procedures in such courts were never deemed analogous to, or required to conform with, procedures in civilian courts."). "Many of the *offences* against the law of nations for which a man may, by the laws of war, lose his life, his liberty, or his property, are not *crimes.*" Military Commissions, 11 Op. Atty Gen. 297 (1865) (emphasis in original).

(4) In *Quirin,* the Supreme Court held that a military commission had the jurisdiction and authority to try and sentence to death eight German saboteurs, one of whom was an American citizen, without the protections afforded in Article III and the Fifth and Sixth Amendments to the Constitution.[2] Resting its decision on the long-established practice in military common law extending back to this country's founding, the High Court said,

> In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the laws of war not triable by jury at common law be tried only in the civil courts.[3]

Likewise, in *Yamashita,* the Supreme Court upheld the conviction and sentence to death of a Japanese General by military commission notwithstanding the fact that the procedure of the commission permitted the admission into evidence depositions, affidavits, hearsay, and opinion evidence, and directed that the commission panel should admit and consider evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man...."[4] There, the High Court held that the benefits afforded by the Articles of War to trials by courts-martial were not applicable to the military commission because the commission "was not convened by virtue of the Articles of War, but pursuant to the common law of war."[5] The Court concluded that the Articles left control over the procedures in military commissions "where it had

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[2] *Quirin,* 317 U.S. at 19, 45.
[3] *Id.* at 40.
[4] *Yamashita,* 327 U.S. at 6, 18 (internal quotations omitted).
[5] *Id.* at 20.

previously been, with the military command," and expressly declined to hold that these procedures violated the right to due process and a fair trial under the Constitution; instead, holding, "***The commission's rulings on evidence and on the mode of conducting these proceedings... are not reviewable by the courts.***"[6] (emphasis added).

(5) In both *Quirin* and *Yamashita,* the Court traced the history of military commissions and relied on that longstanding tradition since the founding of this Country to conclude that the procedural and constitutional protections afforded in civil criminal trials are inapplicable in military tribunals trying cases for offenses cognizable under the law of war. Both of these cases, as well as others, reflect the Supreme Court's understanding that the procedures contained in Article III and the Fifth and Sixth Amendments were nothing more than a "codification" or an "enshrining" of these criminal procedures as they existed in the common law for trials of offenses against the civil law. *See e.g. Lewis v. United States,* 518 U.S. 322, 325 (1996) (holding despite Sixth Amendment stating "In all criminal prosecutions" there was no right to trial by jury for criminal prosecutions of petty offenses because that right never extended at common law at time of Constitution's drafting); *Duncan v. Louisiana,* 391 U.S. 145, 160 (1968)("So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice...."). Likewise, historical precedent and understanding shows the procedures for the prosecution of criminal offenses under the civil law and written into the Constitution were never applied nor were they ever thought to have applied to alien enemy combatants being tried by a military tribunal for an offense cognizable under the law of war. *See e.g.* THE LIEBER CODE OF 1863, SECTION IV, ¶82[7] ("Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, ***but shall be treated summarily*** as highway robbers or pirates.") (emphasis added).

(6) Furthermore, since the founding of this Country through at least as late as the Second World War, there has been no "evolution" in the authority, jurisdiction, or procedural protections applicable to military commissions in the context of trying offenses under the law of war. Thus, the common law in the context of military trials for offenses cognizable under the law of war does not support the notion that Constitutional Due Process applies; the Due Process Clause only embraces the Government's attempt to deprive an individual of life, liberty, or property under the civil law, not under the law of war.

(7) Additionally, there is an abundance of constitutional authority supporting the proposition that an alien enemy combatant, such as the accused, has no cognizable constitutional rights. In *Johnson v. Eisentrager*, 339 U.S. 763, 783-85, 70 S.Ct. 936 (1950), the Supreme Court explicitly rejected any notion that an alien enemy combatant tried by a military commission in

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[6] *Id.* at 20, 23.

[7] Available at www.civilwarhome.com/liebercode.htm. Also attached to this Motion.

China for violations of the laws of war could avail themselves to the protections of the Constitution and the Bill of Rights. There the Court stated:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf. Downes v. Bidwell*, 182 U.S. 244 [21 S. Ct. 770, 45 L.Ed. 1088 (1901)]. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.[8]

There is no evidence that the accused has ever entered the United States, and his criminal conduct is alleged to have occurred in Afghanistan and Pakistan. Although there is authority supporting the notion that an alien may gain some constitutional protections once lawfully coming within the territory of the United States, the Supreme Court explained,

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien ***lawfully*** enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. (emphasis added).[9]

Additionally, the cases of *Reid v. Covert,* 354 U.S. 1 (1957); *Kinsella v. Singleton,* 361 U.S. 234 (1960); *Grisham v. Hagan,* 361 U.S. 278 (1960); and, *McElroy v. Guagliardo,* 361 U.S. 281 (1960) lend further support to the notion that alien enemy combatants cannot avail themselves of the protections of the Constitution or the Bill of Rights. In those cases, the Supreme Court held that civilian dependent spouses of servicemen and civilian contract employees of the armed forces cannot be subjected to military jurisdiction during a time of peace. "When the Government reaches out to punish ***a citizen*** who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." (Emphasis added.).[10] This is in stark contrast to the defendants in *Eisentrager* who were not citizens, but alien enemy combatants who had never lawfully entered or resided in this Country. The accused is in the same legal status of the German saboteurs; that of an enemy combatant.

(8) Similar to *Eisentrager*, the accused is neither a civilian nor an American citizen. He is an alien enemy combatant who has never lawfully entered or resided in this Country, and thus has no protections under the Constitution or the Bill of Rights. As the D.C. Appellate Court in *Hamdan* held, the accused cannot rely on these international agreements as a form of personal right enforceable in any Federal Court; however, the President did decide that the United States would live up to its international agreements through his Military Order, which requires the accused receive a full and fair trial. Therefore, while the Due Process Clause of the Constitution

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[8] *Eisentrager*, 339 U.S. at 784.
[9] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271 (1990).
[10] *Reid*, 354 U.S. at 5.

does not apply to this proceeding or this accused, the discovery order, as written by the Presiding Officer, ensures a full and fair trial for the accused.

b. The Rules Governing The Process Of Discovery In Courts-Martial Are Not Applicable In This Military Commission.

(1) In his military order, the President made it very clear, by the authority vested in him under the Constitution as Commander-in-Chief, the AUMF, and Article 36, UCMJ, "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[11] In deciding that it is not practicable to apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, the President relied not only on his constitutional war powers, but acted with the express blessing and authorization of Congress. *See Hamdan v. Rumsfeld,* 415 F.3d 33, 38 (D.C. Cir. 2005) (holding, "through the joint resolution [referring to the AUMF] and the two statutes just mentioned [referring to Articles 21 and 36, UCMJ], Congress authorized the military commission that will try [the accused]").

(2) In Article 36, UCMJ, Congress explicitly authorized the President to prescribe pretrial, trial, and posttrial procedures, including modes of proof, for cases to be tried before a military commission. The materials required to be discovered clearly constitute part of the "pretrial procedures" contemplated in Article 36. But specifically, Congress gave the President the flexibility and discretion to dispense with "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts"[12] if he found it impracticable to so apply those principles of law and rules of evidence. The President's constitutional war powers combined with Congress' AUMF authorizing the President to use military commissions and congressional statutes 10 U.S.C. §§ 821 and 836, solidify his authority to dispense with the rules and procedures governing discovery in a courts-martial. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[13]

(3) Military commissions have long been recognized as our "common law war courts" and the Supreme Court has acknowledged that "neither their procedure nor their jurisdiction has been prescribed by statute."[14] *See also,* THE LIEBER CODE OF 1863[15] ("Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war.... In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military commissions."); *and* The Modac Indian Prisoners, 14 Op. Atty Gen. 249 (1873) (relying on the Lieber Code as among many precedents supporting the authority of the President to try certain Modac Indian prisoners

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[11] PMO, § 1(f).
[12] 10 U.S.C. §836.
[13] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring).
[14] *Madsen v. Kinsella,* 343 U.S. 341, 346-48 (1952).
[15] See note 14, *supra.*

in military commissions for violations of the common law of war). Not only has Congress declined to statutorily prescribe the procedures governing trials by military commission, Congress explicitly gave that authority to the President in Article 36, UCMJ, and the President and his designees have done so through the promulgation of the commission law that governs these proceedings.

(4) A virtually identical argument by the Defense was pressed in the Supreme Court case of *Yamashita v. Styler*.[16] There, it was urged that Articles of War 25 and 38 applied to a military commission and that General Yamashita's commission admitted evidence in violation of those Articles. Of note, both Articles expressly mentioned military commissions as well as military courts-martial. That notwithstanding, the Supreme Court held,

> We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates "the persons . . . subject to these articles," who are denominated, for purposes of the Articles, as "persons subject to military law." ***In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them.***
>
> By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war. ***But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons.*** The Articles recognized but one kind of military commission, not two. ***But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials.***
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> . . .
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> It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. ***The Articles left the control over the procedure in such a case where it had previously been, with the military command.*** (Emphasis added).[17]

[16] 327 U.S. 1 (1946).
[17] 327 U.S. at 20.

Likewise here, the accused is of the class of persons to which the Uniform Code does not apply. At the time of the accused's conduct, he was not subject to the UCMJ and nothing in the UCMJ connotes Congress' intent to make him subject to the UCMJ prior to his capture or for his precapture law of war offenses. To the contrary, through Articles 18 and 21, UCMJ, Congress expressly gave jurisdiction to a general court-martial to try any person, including individuals who are not subject to the Code for offenses under the common law of war, but Congress also preserved the common law military commission as another tribunal capable of trying such persons. Nothing in those Articles, just as in the predecessor Articles of War, indicates that Congress intended to bring in "any person" and make them subject to the Code and grant them all of the protections the Code offers.

(5) Once more, Congress enacted the UCMJ a number of years subsequent to the Supreme Court's decision in *Yamashita* interpreting the predecessor Articles of War, including those Articles that expressly mentioned applicability to military commissions, as not applying to trials of alien enemy combatants by common law military commissions. Congress has also made numerous amendments to the UCMJ, and to this date, nothing appears in the UCMJ indicating Congress' disapproval of the Supreme Court's interpretation in *Yamashita*. It should be presumed that when Congress enacted the UCMJ, it did so with full knowledge of the Supreme Court's decision in *Yamashita*. And if Congress disagreed with the High Court's interpretation of Articles of War not applying to military commissions of alien enemy combatants, it would have so indicated in the UCMJ. "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."[18] *See also Keene v. United States*, 508 U.S. 200, 209 (1993) (presuming Congress' comprehensive revision of the Judicial Code did not displace precedent interpreting the prior Code unless such intent was clearly made).

(6) The accused's military commission was not convened by virtue of the UCMJ, but pursuant to the common law of war. Thus, the rules, procedures, and precedents governing discovery in a courts-martial convened by virtue of the UCMJ are inapplicable to this accused being tried by a common law military commission convened by virtue of the common law of war.

(7) In determining that the rules of procedure and evidence used in an everyday criminal trial are inapplicable to these military commissions convened for the purpose of adjudicating offenses under the law of war by alien enemy combatants, the President relied on both constitutional and congressional authorization backed by years of historical precedent. Both the D.C. Court of Appeals in *Hamdan* and the U.S. Supreme Court in *Yamashita* and *Madsen* confirm the President's authority to establish what the rules of procedure will be for the accused's military commission. With the exception of the procedures outlined in the PMO, the President, under the authority of Congress, delegated to the Secretary of Defense and his designees the authority to promulgate more detailed rules governing the procedures for this Military Commission. That determination has a sound basis in law and should not be disturbed by this Commission. Accordingly, the Presiding Officer should find the Defense's motion lacks any merit and decline to grant any relief.

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[18] *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957).

(8) The Presiding Officer's Discovery Order is in compliance with Military Commission Order No. 1 and provides for a full and fair trial for the accused. The Discovery Order requires the Prosecution turn over evidence it intends to use at trial as well as evidence determined to be exculpatory. Exculpatory evidence is defined by the Discovery Order as any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment. Access to such evidence ensures the accused will receive a full and fair trial.

(9) Without addressing each and every defense assertion and/or request for modification to the orders (as the requested modifications simply seek relief in the form of adopting the applicable standard of discovery for courts-martial), it is necessary to note that the defense assertion that there is a substantial absence of discovery procedures and obligations is without merit. The Discovery Order takes great pains, and goes into significant detail, to list and define the discovery procedures and obligations required to ensure that the requirements of Military Commission Order No. 1 are met, and that the accused receive a full and fair trial.

(10) The defense assertion that that the Discovery Order fails to impose on the prosecution the burden to disclose information referenced in RCM 701(a)(6) and ABA Model Rules for Professional Conduct, Rule 3.8. is also without merit. RCM 701(a)(6) states that "the trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to negate the guilt of the accused, reduce the degree of guilt of the accused to the defense charged, or reduce the punishment." This requirement is substantively identical to the requirement of the Discovery Order which requires disclosure of evidence that "tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment."

(11) ABA Model Rule 3.8, Special Responsibilities of a Prosecutor (to the extent it governs discovery obligations), in pertinent part states:

> [Prosecutor must] make timely disclosure to the defense of all evidence or Information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

See ABA Model Rule 3.8. Other than failing to make the distinction between the privileged or unprivileged nature of mitigating evidence, the Discovery Order is substantively identical to ABA Model Rule 3.8 as well.

(12) While it is clear that the Discovery Order does not match the discovery requirements for courts-martial or Federal Courts *verbatim*, the Discovery Order, as written, and without the need for modification, allows for the accused to enjoy a full and fair trial, consistent with commission law. Commission law, and not the 5th Amendment, defines the process the accused is due as an enemy combatant. The Defense request to adopt, in total, the discovery procedures employed in courts-martial practice is tantamount to an assertion that *any legal*

system that does not follow the exact discovery rules articulated in the Rules for Courts-Martial, and applicable military case law, fails to provide for a full and fair trial. There are many legal systems that dispense justice in the civilized world, and they all have their own rules and procedures regarding discovery. The Discovery Order, in accordance with Military Commission Order No. 1, provides for a full and fair trial. Accordingly, the defense motion should be denied.

7. Burdens. The Burden is on the accused to establish any entitlement to his requested relief.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses and Evidence. None

10. Additional Information. None

11. Attachments. (a) ABA Model Rule 3.8 (1 page)
(b) Leiber Code of 1863 (15 pages)

12. Submitted by:

[redacted]

Prosecutor

network CLICK HERE TO RETURN TO PREVIOUS PAGE

Center for Professional Responsibility

Model Rules of Professional Conduct

ADVOCATE

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

> **(1) the information sought is not protected from disclosure by any applicable privilege;**
>
> **(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and**
>
> **(3) there is no other feasible alternative to obtain the information;**

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

The Lieber Code of 1863

CORRESPONDENCE, ORDERS, REPORTS, AND RETURNS OF THE UNION AUTHORITIES FROM JANUARY 1 TO DECEMBER 31, 1863.--#7
O.R.--SERIES III--VOLUME III [S# 124]

GENERAL ORDERS No. 100.

WAR DEPT., *ADJT. GENERAL'S OFFICE,*
Washington, April 24, 1863.

The following "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, LL.D., and revised by a board of officers, of which Maj. Gen. E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.

By order of the Secretary of War:
E. D. TOWNSEND,
Assistant Adjutant-General.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.

SECTION I.--*Martial law--Military jurisdiction--Military necessity--Retaliation.*

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its martial law.

2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief, or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4. Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity--virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5. Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist or are expected and must be prepared for. Its most complete sway is

allowed--even in the commander's own country--when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government--legislative, executive, or administrative--whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of ambassadors, ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the Army, its safety, and the safety of its operations.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offenses to the contrary shall be severely punished, and especially so if committed by officers.

12. Whenever feasible, martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13. Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to

the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the Army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16. Military necessity does not admit of cruelty--that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18. When a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27. The law of war can no more wholly dispense with retaliation than can the law of

nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will therefore never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover cautiously and unavoidably--that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. Modern times are distinguished from earlier ages by the existence at one and the same time of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.--*Public and private property of the enemy--Protection of persons, and especially of women; of religion, the arts and sciences--Punishment of crimes against the inhabitants of hostile countries.*

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful-- on the contrary, it is held to be a serious breach of the law of war--to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character-such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such

as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and the churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the Army or of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war--such as judges, administrative or political officers, officers of city or communal governments--are paid from the public revenue of the invaded territory until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

42. Slavery, complicating and confounding the ideas of property (that is, of a thing), and of personality (that is, of humanity), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment

as may seem adequate for the gravity of the offense.

A soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.

47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred.

SECTION III.--*Deserters--Prisoners of war--Hostages--Booty on the battle-field.*

48. Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture or being delivered up to the American Army; and if a deserter from the enemy, having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the Army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war and are not entitled to their protection.

53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses, and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are no individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their Army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the Army, receive none.

63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign State, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American Army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if large sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the Army, under the direction of the commander, unless otherwise ordered by the Government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they have been placed in the private luggage of the prisoners.

73. All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

74. A prisoner of war, being a public enemy, is the prisoner of the Government and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The Government alone releases captives, according to rules prescribed by itself.

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76. Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77. A prisoner of war who escapes may be shot, or otherwise killed, in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

78. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle, after having rejoined their

own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information, or to punish them for having given false information.

SECTION IV.--*Partisans--Armed enemies not belonging to the hostile army--Scouts--Armed prowlers-- War-rebels.*

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or to armed violence.

SECTION V.--*Safe-conduct--Spies-- War-traitors-- Captured messengers-Abuse of the flag of truce.*

86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the Government or by the highest military authority.

Contraventions of this rule are highly punishable.

87. Ambassadors, and all other diplomatic agents of neutral powers accredited to the enemy may receive safe-conducts through the territories occupied by the belligerents, unless

there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state and not by subordinate officers.

88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

89. If a citizen of the United States obtains information in a legitimate manner and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war-traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offense.

93. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory or foreign visitors in the same can claim no immunity from this law. They may communicate with foreign parts or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99. A messenger carrying written dispatches or verbal messages from one portion of the army or from a besieged place to another portion of the same army or its government, if armed, and in the uniform of his army, and if captured while doing so in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103. Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the Government, or, at a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war-traitor, safely returned to his own army, and afterward captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.--*Exchange of prisoners--Flags of truce--Flags of protection.*

105. Exchanges of prisoners take place--number for number--rank for rank--wounded for wounded--with added condition for added condition--such, for instance, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the Government, or of the commander of the army in the field.

107. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange, nor a higher rank, for the purpose of obtaining better treatment.

Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable as soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

111. The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles when hospitals are situated within the field of the engagement.

116. Honorable belligerents often request that the hospitals within the territory of the

enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII.--*The parole.*

119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120. The term parole designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121. The pledge of the parole is always an individual, but not a private act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125. When paroles are given and received there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battle-field; no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

129. In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war unless exchanged.

This pledge refers only to the active service in the field against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be

employed.

131. If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them.

SECTION VIII.--*Armistice--Capitulation.*

135. An armistice is the cessation of active hostilities for a period agreed between belligerents. It must be agreed upon in writing and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared without conditions it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137. An armistice may be general, and valid for all points and lines of the belligerents; or special--that is, referring to certain troops or certain localities only. An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, does in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated the intercourse remains suspended, as during actual hostilities.

142. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists whether the besieged have a right to repair breaches or to erect new works of defense within the place during an armistice, this point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145. When an armistice is clearly broken by one of the parties the other party is released from all obligation to observe it.

146. Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case the war is carried on without any abatement.

SECTION IX.--*Assassination.*

148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

SECTION X.--*Insurrection-- Civil war--Rebellion.*

149. Insurrection is the rising of people in arms against their government, or portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

151. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the

future relations between the contending parties.

154. Treating in the field the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155. All enemies in regular war are divided into two general classes--that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens in revolted territories against the hardships of the war as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens, of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.

This Page last updated 02/10/02

RETURN TO CIVIL WAR ARMIES PAGE

UNITED STATES OF AMERICA	**D 3 (Barhoumi)**
	PROSECUTION RESPONSE
v.	To Defense Motion for Appropriate Relief
	Transfer of the Accused as Punishment for Cooperation in Commission Proceedings
SUFYIAN BARHOUMI	**18 April 2006**

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Relief. The Defense motion should be denied.

3. Overview. The President's Military Order of 13 November 2001, in pertinent part, requires that detainees be treated humanely. The accused is being treated humanely, and the decision to move the accused and other charged detainees from Camp 4 to Camp 5 was made by the Commander of Joint Task Force, Guantanamo Bay, Cuba, and the decision to do so is his alone. The changes in the camps were made as a result of a re-organization of all of the detention camps and to comply with Army Regulation 190-47[1], Army Regulation 190-8[2], and sound correctional doctrine which recommends separating various classes of detainees. Separating the group of charged detainees from the uncharged individuals increases the safety and security of the facilities for all detainees. The accused's move from Camp 4 to Camp 5 was not done to punish him, nor has the accused's right to a full and fair trial been impacted. The Defense motion should be denied.

4. Facts.

a. The accused was moved from Camp 4 to Camp 5.

5. Legal Authority.

a. The President's Military Order of 13 November 2001.
b. Military Commission Order No. 1 dtd 31 August 2005.
c. Military Commission Instruction No. 8 dtd 16 September 2005.

[1] Army Regulation 190-47 (104 pages) can be found at http://www.army.mil/usapa/epubs/pdf/r190_47.pdf

[2] Army Regulation 190-8 (86 pages) can be found at http://www.army.mil/usapa/epubs/pdf/r190_8.pdf

6. Discussion

a. The President's Military Order of 13 November 2001, in pertinent part, requires that individuals who are detained be treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria. The detainees must be afforded adequate food, drinking water, shelter, clothing, and medical treatment and be allowed the free exercise of religion consistent with the requirements of such detention. *See* Presidents Military Order §3 (a)(b)(c)(d). The accused in this case, Sufyian Barhoumi, is being detained in accordance with the President's Military Order and is being treated humanely. While the nature of the accused's detention has changed, this change has not impacted the accused's right to a full and fair trial.

b. The decision to move the accused and other charged detainees to Camp 5 was made by the Commander of Joint Task Force, Guantanamo Bay, Cuba, and the decision to do so is his alone. The accused and other individuals charged before military commissions have been moved to Camp Five and now all live in the same wing of the camp.[3] As the affidavit of Colonel Michael Bumgarner, Detention Group Commander, Joint Task Force Guantanamo Bay attests, this decision was done very conscientiously, not arbitrarily, or for the sake of punishment. The changes in the camps were done as a result of a re-organization of all of the detention camps and to comply with Army Regulation 190-47, Army Regulation 190-8, and sound correctional doctrine which recommends separating various classes of detainees. Separating the group of charged detainees from the uncharged individuals increases the safety and security of the facilities for all detainees. *See* Bumgarner affidavit Page 1 and 2. There was ***no intent*** to impact the accused's right to a full and fair trial or to interfere with the attorney-client relationship, and there has been ***no actual impact*** to the accused's right to a full and fair trial.

c. This commission has limited jurisdiction and the authority of the Presiding Officer is limited to that authority granted by the President's Military Order of 13 November 2001 and its subsequent orders, directives, and instructions that refer to the duties of the Presiding Officer and the authority of the commission. The commission has no authority other than the authority expressly granted under commission law, and the commission is not a court of general jurisdiction. The Presiding Officer is not a judge and does not have any inherent judicial authority to issue a direct order to Commander, JTF-GTMO, to move an accused being detained in his camp. The duties and powers of the Presiding Officer, both direct and implied, are set forth in MCO No. 1 para. 4 (5) and MCI No. 8 (5) respectively. Commission law does not authorize the Presiding Officer, or the commission, to issue writs of mandamus. However, the Presiding Officer *is* required to ensure the accused is provided a full and fair trial. It is only to the extent that the accused's circumstances of detention may actually impact his right to a full and fair trial that the Presiding Officer may act, and then only in a manner that would abate the commission proceedings until the impediment to the accused receiving a full and fair trial is removed.

[3] There are two other individuals who have been charged who have not yet been moved to Camp 5.

d. Before the Presiding Officer may take any action on the issue of the accused being moved from Camp 4 to Camp 5, he must first make a finding that the accused's right to a full and fair trial has been impacted by the accused's move. The evidence shows the accused's right to a full and fair trial is in no way impacted by his move to Camp 5, there was no intentional governmental interference with the attorney-client relationship, nor was the move effectuated to punish the accused for his cooperation in the proceedings.

e. According to Colonel Bumgarner's affidavit, Camp Five is an exact replica of an American Correctional Institute-certified prison in Indiana. It is a general population facility where the detainees have their own cells. The detainees can communicate through the walls and are not discouraged from doing so. The accused is allowed to participate in daily prayers, which occurs five times each day, and one of the detainees leads those prayers. Contrary to the defense assertion, the accused is not being held *incommunicado*. The commission detainees are not segregated, held in isolation, or in solitary confinement. The detainee is allowed two hours of recreation a day, where he can communicate with up to five other detainees who are also recreating. While Camp 4 may have been more enjoyable for the accused, he has no *right* to the privileges he was granted prior to his move to Camp 5.

f. The defense assertion that the accused's move from Camp 4 to Camp 5 was retaliatory for his cooperation with the commission process is unsupported by the evidence. The defense cites to the fact that the only two charged detainees that have not been moved to Camp 5 are individuals who have refused to cooperate with the commission process, and makes a tangential leap from there, claiming the above fact supports the argument that the accused is being punished for his cooperation. Notwithstanding the fact that it is completely illogical for any agency of the government to want to punish an accused for cooperating in a criminal process instituted *by the government*, Colonel Bumgarner's affidavit specifically states that it is his intention to move the other two detainees to Camp 5 when it is operationally feasible. It is clear there is no intent to punish any of the charged detainees, for their cooperation or otherwise, by JTF-GTMO in moving the commission detainees to Camp 5, as it is equally clear that the two detainees that have not yet been moved are not being "rewarded" for being uncooperative.

g. The accused's right to a full and fair trial has not been impacted by his move from Camp 4 to Camp 5, nor has there been any intentional governmental interference in the attorney-client relationship. It has not even been alleged by the defense that access to their client has been changed in any way. The accused can fully participate in his defense and can meet with his attorneys under the same conditions that existed prior to his move to Camp 5. The accused's general unhappiness in his changed conditions comes no where close to showing that his right to a full and fair trial is impacted, or that the government affirmatively interfered with the attorney-client relationship.

h. The accused, along with approximately five hundred others, is being detained in Guantanamo Bay as an enemy combatant in accordance with the laws of war. While he is being treated humanely, the accused does not get to choose the conditions of his confinement. Any subsequent refusal on the part of the accused to cooperate with his defense counsel (which according to the defense assertions in its motion appears to still be speculative at this point) would be a voluntary, conscious decision on his part and should play no role in the Presiding Officer's determination in this matter. While, if true, the accused's inability to wash himself properly is regrettable, this is an issue that needs to be brought up to the appropriate JTF-GTMO authorities for action; not this commission. Accordingly, the defense motion should be denied.

7. Burdens. The burden is on the accused to establish that his right to a full and fair trial is impacted by his move to Camp 5.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses and Evidence.

(a) Affidavit of Col Michael I. Bumgarner, Commander, Joint Detention Group, Joint Task Force Guantanamo Bay, Cuba dtd 6 April 2006 (found in the defense filing and not re-filed here).

10. Additional Information. None

11. Attachments. None

12. Submitted by:

[redacted]
Prosecutor

BARHOUMI
REVIEW EXHIBIT 41

Review Exhibit (RE) 41 is curriculum vitae of Translators "A" and "B."

RE 41 consists of 7 pages.

Translators A and B have requested, and the Presiding Officer has determined that RE 41 not be released on the Department of Defense Public Affairs web site. In this instance Translators A and B's right to personal privacy outweighs the public interest in this information.

RE 41 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 41.

//signed//

M. Harvey
Chief Clerk of Military Commissions

[redacted]

Military Commission Case No. 05-0005

UNITED STATES v. GHASSAN ABDULLAH AL SHARBI a/k/a Abdullah al Muslim a/k/a Abu Muslim	)	**Military Commission Members** Appointing Order No. 06-0004 FEB 0 1 2006

Appointing Order No. 05-0006 dated December 12, 2005, appointing military commission members in the above-styled case, is amended as follows:

Lieutenant Colonel [redacted] USMC, Second Alternate Member, is excused from participation in the case of United States v. Ghassan Abdullah Al Sharbi, pursuant to Paragraph (4)(A)(3) of Military Commission Order No. 1 dated August 31, 2005, due to his impending terminal leave and retirement effective May 1, 2006.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

[redacted]

[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1640

APPOINTING ORDER No. 06-0010 March 27, 2006

Appointing Order Numbers 05-0004, 05-0005, 05-0006, 05-0007, 05-0008, and 06-0001, appointing military commission members, are amended as follows:

Colonel [redacted] USAF, Member, is excused from participation in all military commission cases, pursuant to Paragraph (4)(A)(3) of Military Commission Order No. 1 dated August 31, 2005, due to his impending retirement.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

cc:
Presiding Officer
Chief Prosecutor for Military Commissions
Chief Defense Counsel for Military Commissions
Detailed Military Defense Counsel

[redacted]

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

APPOINTING AUTHORITY

February 14, 2006

[redacted]

Dear [redacted]

I have reviewed your request to be excused as a panel member for the Military Commissions. While I understand your concern regarding a possible career opportunity, your request is denied.

Serving as a member of the Military Commissions is an important duty. You were nominated by your service and selected to serve. Military Commission members are chosen based on their age, education, training, experience, length of service, and judicial temperament. They are absolutely critical to the process of affording all defendants a full and fair trial.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Index of Current POMs – April 23, 2006

See also: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

Number	Topic	Date
1 - 2	Presiding Officers Memoranda	September 14, 2005
2 - 2	Appointment and Role of the Assistant to the Presiding Officers	September 14, 2005
3 - 1	Communications, Contact, and Problem Solving	September 8, 2005
4 - 3	Motions Practice	September 20, 2005
5 - 1 *	Spectators at Military Commissions	September 19, 2005
6 - 2	Requesting Conclusive Notice to be Taken	September 9, 2005
7 - 1	Access to Evidence, Discovery, and Notice Provisions	September 8, 2005
8 - 1	Trial Exhibits	September 21, 2005
9 - 1	Obtaining Protective Orders and Requests for Limited Disclosure	September 14, 2005
10 - 2	Presiding Officer Determinations on Defense Witness Requests	September 30, 2005
11	Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials	September 7, 2005
12 - 1	Filings Inventory	September 29, 2005
13 - 1 *	Records of Trial and Session Transcripts	September 26, 2005
14 - 1 *	Commissions Library	September 8, 2005
(15)	There is currently no POM 15	
16	Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses	February 16, 2006
(17)	There is currently no POM 17	
18	8-5 Conferences	March 21, 2006

* - Also a joint document issued with the Chief Clerk for Military Commissions.

Hodges, Keith H CIV USSOUTHCOM JTFGTMO

From: Faulkner, Wade N Capt USSOUTHCOM JTFGTMO
Sent: Monday, April 24, 2006 3:57 PM
To: Hodges, Keith H CIV USSOUTHCOM JTFGTMO; Broyles, Bryan T LTC USSOUTHCOM JTFGTMO; Kuebler, William C LT OMC
Cc: [redacted]
Subject: RE: Identity of Defense Translators

US v. Barhoumi defense translator is [redacted]

v/r

CPT Faulkner

-----Original Message-----
From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Sent: Mon, April 24, 2006 10:15 AM
To: Broyles, Bryan T LTC USSOUTHCOM JTFGTMO; Faulkner, Wade N Capt USSOUTHCOM JTFGTMO; Kuebler, William C LT OMC
Cc: [redacted] Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Subject: Identity of Defense Translators

The POs support the desire of Defense Translators who do not wish to have their names mentioned on the record. However, it is still necessary that the record reflect who they were in the form of an RE which, before release, can be redacted..

Defense, please reply to this email with the name of the defense translator. That document will be marked as an RE.

Keith Hodges
Assistant to the Presiding Officers
[redacted]

Filings Inventory –

US v. Barhoumi

Issued in accordance with POM #12-1.
See POM 12-1 as to counsel responsibilities.

This Filings Inventory includes only those matters filed since4 Nov 2005.

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	RE
				•	

Defense (D Designations)
Dates in red indicate due dates

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 1 - Motion Opposing Convening in the Absence of Members	6 Feb 06	13 Feb		• Motion filed 6 Feb 06. • A. Pros response	ORIG – 19 A - 22
D 2: Motion Opposing Discovery Order	5 April	12 Apr 06		• Motion filed, 5 April 06. • A. Prosecution response, 12 Apr.	ORIG – 37 A - 39
D 3: Transfer of Accused to Camp 5 as Punishment	12 Apr 06	18 Apr 06		• Motion filed. • A. Prosecution response, 18 April 06	ORIG – 38 A – 40
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PO Designations

Designation Name (PO)	Status /Disposition/Notes 0RIG = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 1 – Scheduling **No apparent counsel problems.** **No reason DC shouldn't comply with trial order (PO 1 C)** **Set for Feb term of commission.**	• Initial directions of PO w/ three attachments, Dec 21 05 • A. pros and defense ready • B. Announcement of Feb trial term, 19 Jan 06 • C. Trial order, Feb 2006 • D. Prosecution schedule. • E. Defense proposed trial schedule.	ORIG – 7 A – 10 B – 12 C – 14 D - 23 E - 31
	•	
PO 2 - Discovery	• Discovery Order, Dec 21 05. • INFO: Pros request to delay some Discovery until 1 Mar approved. • INFO: Defense request to delay completing discovery until 31 Mar approved. • INFO: Prosecution granted delay to complete discovery to 1 April. • INFO: Defense granted delay to complete discovery to 1 May • A. Modification to Discovery Order (3 Mar 06). • Note Prosecution deadline extended until 1 May. Defense deadline extended until 1 June.	ORIG – 8 A - 35
PO 3 – Voir Dire	• Presiding Officers biographical summary. • Note: PO sent supplement to Voir Dire materials, 22 Feb 06. This was made RE 26. •	ORIG – 13
PO 4 - Motions	• 25 Jan APO email RE Preserving Objections and POM 4-3 and 12-1	ORIG - 18

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
	Protective Order # 1	1	23 Jan 06	ID of all witnesses	**15**
	Protective Order # 2	2	23 Jan 06	ID of investigators	**16**
	Protective Order # 3	3	23 Jan 06	FOUO and other markings	**17**
				•	

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference Notes	RE
				•	

Inactive Section

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
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Inactive Section

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
P 1 - Motion to Join Cases (6 Feb 06)	• Motion filed 6 Feb • A. Defense response • B. Prosecution requested to withdraw this motion. Defense had no objection. 21 Feb 06	ORIG – 20 A – 21 B - 25

UNITED STATES OF AMERICA
v.
SUFYIAN BARHOUMI
a/k/a Abu Obaida
a/k/a Ubaydah Al Jaza'iri
a/k/a Shafiq

Protective Order # 3-A
Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings

25 April 2006

This Protective Order supercedes Protective Order #3 in the above-styled case, and has been issued pursuant to Commission Law, at the request of the Prosecution and with the consent of the Defense, to ensure the protection of information, and so that the parties may advance the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. Generally: The following Order is issued to provide general guidance and specific prohibitions regarding the below described documents and information. Unless otherwise noted, required, or requested, it does not govern the use of such documents or information in open court.

2. Scope: This Order pertains to information, in any form, provided or disclosed to the defense team in their capacity as legal representatives of the accused before a military commission. Protection of information in regards to litigation separate from this military commission would be governed by whatever protective orders are issued by the judicial officer having cognizance over that litigation.

3. Definition of Prosecution and Defense: For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants assisting the Defense in Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

4. Effective Dates and Classified Information: This Protective Order shall remain in effect until rescinded or modified by the Presiding Officer or other competent authority. This Order shall not be interpreted to suggest that information classified under the laws or regulations of the United States may be disclosed in a manner or to those persons inconsistent with those statutes or regulations.

5. UNCLASSIFIED SENSITIVE MATERIALS:

a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense

("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer. Nothing in this Protective Order limits a member of the Defense team from divulging, publishing, or revealing, either by work, conduct, or any other means, to members of other Defense teams, documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive," provided that the other defense team member to whom divulging, publishing, or revealing is to be made is already in possession of the same documents or information through discovery in a case pending before a Military Commission to which that other defense team member is detailed, and said information is subject to an identical protective order as has been issued in this case.

b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

c. Nothing in this Protective Order limits the Defense team from divulging, publishing, or revealing, either by word, conduct, or any other means, to the accused, documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive," provided such documents have been disclosed to the Defense team by the Prosecution, and provided further that those documents have been redacted to comply with Protective Orders 1 and 2, or later versions of such order or orders.

6. <u>CLASSIFIED MATERIALS:</u>

a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any post-trial U.S. federal litigation that may occur.

7. **BOOKS, ARTICLES, OR SPEECHES:**

a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

b. The provisions in paragraph 7a apply to information learned in the course of representing the accused before this commission, no matter how that information was obtained. For example, paragraph 7a:

(1) Does not cover press conferences given immediately after a commission hearing answering questions regarding that hearing so long as it only addresses the aspects of the hearing that were open to the public.

(2) Does not cover public discourses of information or experiences in representing the accused before this military commission which is already known and available in the public forum, such as open commission hearings, and motions filed and made available to the public.

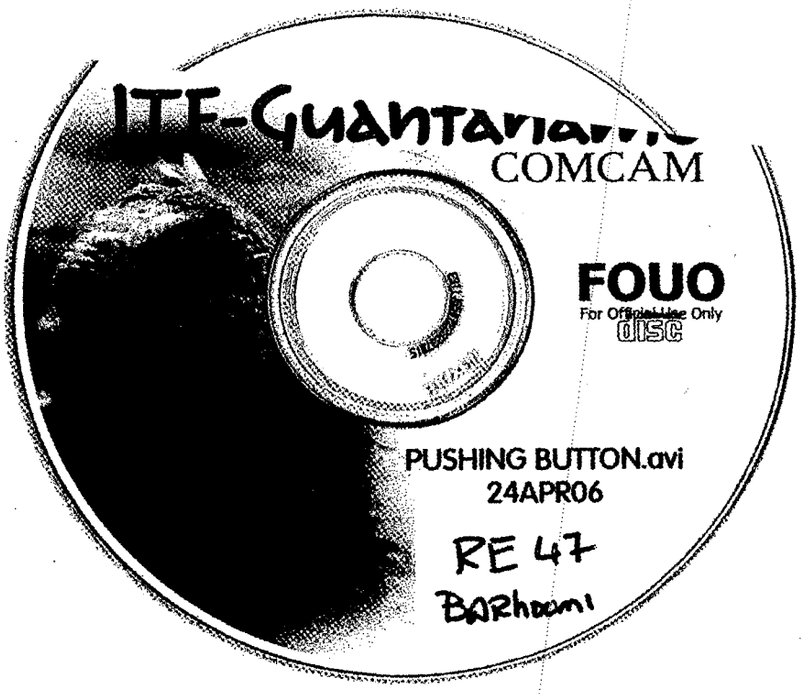
(3) Does cover information or knowledge obtained through any means, including experience, that is not in the public forum, and would and could only be known through such an intimate interaction in the commission process (for example, a defense counsel's experience logistically in meeting a client).

8. REQUEST FOR EXCEPTIONS: Either party may file a motion, under seal and in accordance with POM 4-3 or 9-1 as appropriate, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

9. BREACH: Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer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